STATE OF MICHIGAN
IN THE SUPREME COURT

IVAN FRANK, JEFFREY DWOSKIN, PHILLIP D. JACOKES, ROY KRAUTHAMMER, BLAKE ATLER, MATT KOVALESKI, JAMES BRUNK, and **IJF HOLDINGS, LLC,**

Plaintiffs/Appellees,

v.

DANIEL GILBERT, JOSHUA LINKNER, BRIAN HERMELIN, GARY SHIFFMAN, DAVID KATZMAN, ARTHUR WEISS, JAY FARNER, CAMELOT-ePRIZE, LLC, BH ACQUISITIONS, LLC, CRACKERJACK, LLC f/k/a ePRIZE, LLC, and **CRACKERJACK HOLDINGS, LLC,** f/k/a ePRIZE HOLDINGS, LLC,

Defendants/Appellants.

MSC No. 151888
COA No. 318751
L/C No. 13-133554
Hon. Colleen O'Brien

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

Brian G. Shannon (P23054)
R. Christopher Cataldo (P39353)
JAFFE, RAITT, HEUER & WEISS, P.C.
Attorneys for Appellants other than
Daniel Gilbert and Jay Farner
27777 Franklin Road, Suite 2500
Southfield, MI 48034
(248) 351-3000
bshannon@jaffelaw.com

Jeffrey B. Morganroth (P41670)
MORGANROTH & MORGANROTH, PLLC
Attorney for Gilbert and Farner
344 N. Old Woodward Ave., Ste. 200
Birmingham, MI 48009
(248) 864-4000
jmorganroth@morganrothlaw.com

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

In March 2009, Defendant/Appellant Crackerjack, LLC, f/k/a ePrize, LLC ("ePrize") restructured itself by amending its operating agreement and issuing new "Series C" and "Series B" membership units with over $100 million in payment priority above older units. In August 2012, ePrize sold substantially all of its assets and distributed the proceeds exactly as required by the amended operating agreement. The proceeds were insufficient to pay the older, lower-priority membership units, including most of the units held by the two plaintiffs who owned any units.

In 2013, Plaintiffs, a group of former ePrize employees,[1] filed this suit against ePrize and others, claiming that the March 2009 restructuring was a scheme to dilute their membership units by creating "super-preferred equity," *i.e.*, the Series C and B units. The circuit court dismissed their suit as untimely, holding that it was time-barred by a three-year statute of repose and that even if it were a statute of limitation, the claims were still time barred because they accrued in 2009, when the new membership units were created and given distribution priority (App 13a, 20a-23a). The court did not rule on ePrize's other challenges to the suit, including most plaintiffs' lack of standing and one plaintiff's release agreement and consent (App 23a). Plaintiffs appealed.

The Court of Appeals reversed and remanded in a published opinion. *Frank v Linkner*, 310 Mich App 169, 871 NW2d 363 (2015) (App 39a-49a). The panel circumvented the "repose" holding of *Baks v Moroun*, 227 Mich App 472, 486 (1998), *ovrrld in pt on other grds by Estes v Idea Engineering*, 250 Mich App 270 (2002), by treating it as dicta (App 46a-47a), and then held that the three-year limitations period in MCL 450.4515(1)(e) (*infra* at x) did not begin to run in

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1 Plaintiffs/Appellees, when referred to collectively in this brief, will be called "Plaintiffs." The large subcategory of Plaintiffs who owned no units of ePrize (and hence lack standing) will be called the "Nonmember Plaintiffs." The lead Plaintiff, Ivan Frank—and his company, IJF Holdings, LLC—who consented to the 2009 restructuring, will be called "Frank."

2009, as the circuit court had held, but in 2012, when a liquidation event occurred (App 47a-48a). ePrize sought reconsideration, which was denied.

ePrize sought leave to appeal from this Court on July 2, 2015. This Court granted leave on February 3, 2016.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal under MCR 7.303(B)(1).

STATEMENT OF QUESTIONS INVOLVED

(as stated in the ePrize application for leave)

I.

Did the Court of Appeals err in holding that a cause of action for minority oppression does not accrue at the time the members recapitalize the company in a manner alleged to oppress the minority, but instead accrues many years after the alleged harmful acts when the company is liquidated and distributes assets as required by the earlier recapitalization?

ePrize says yes.

The trial court says yes.

The Court of Appeals says no.

II.

If not mooted by the decision of the accrual issue, should this Court:

(i) note that the Court of Appeals erred in treating the *Baks* "repose" decision as dicta, not binding under MCR 7.215(J)(2); and

(ii) hold that the three-year provision of MCL 450.4515(1)(e) is a statute of repose?

ePrize says yes.

The trial court says yes.

The Court of Appeals says no.

STATUTORY PROVISION INVOLVED

MCL 450.4515

1) A member of a limited liability company may bring an action…to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member. If the member establishes grounds for relief, the circuit court may issue an order or grant relief as it considers appropriate, including, but not limited to, an order providing for any of the following:

   (a) The dissolution and liquidation of the assets and business of the limited liability company.
   (b) The cancellation or alteration of a provision in the articles of organization or in an operating agreement.
   (c) The direction, alteration, or prohibition of an act of the limited liability company or its members or managers.
   (d) The purchase at fair value of the member's interest in the limited liability company, either by the company or by any members responsible for the wrongful acts.
   (e) An award of damages to the limited liability company or to the member. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued or within 2 years after the member discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

2) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member….The term does not include conduct or actions that are permitted by the articles of incorporation, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure.

FACTS AND PROCEEDINGS

A. The Parties

Defendants/Appellees include:

- ePrize, a Michigan limited liability company that was in the business of conducting on-line promotions until it sold substantially all of its assets on August 20, 2012;
- Crackerjack Holdings, LLC f/k/a ePrize Holdings, LLC ("HoldCo"), a holding company and minority member of ePrize;
- Joshua Linkner, ePrize's founder, its former CEO, one of its managers, and the sole manager of HoldCo;
- Daniel Gilbert and Jay Farner, who are alleged to control Camelot-ePrize, LLC, a manager of ePrize, although they are not themselves managers or members of ePrize;
- BH Acquisitions, LLC, a member of ePrize; and
- Four other individuals who are or were managers of ePrize.

Plaintiffs/Appellees include:

- Ivan Frank, a minority member of ePrize, and a subscriber to the Series C units;
- IJF Holdings, LLC, Frank's company;
- Jeffrey Dwoskin, Phillip Jacokes, Roy Krauthammer, Blake Atler, Matt Kovaleski, and James Brunk, all of whom were members of HoldCo, but none of whom were ever members of ePrize, although they were formerly employed by ePrize.
- Blake Atler, who owned some nonvoting units of ePrize.

B. The 2007 Loans

It is undisputed that ePrize issued four rounds of subordinated debentures in 2007. These "subordinated debentures" were promissory notes evidencing ePrize's borrowings from its members to sustain its business operations, including to get through what had become a severe economic downturn gripping Michigan and much of the country by late 2007. The four rounds of ePrize borrowings from its members in 2007 were as follows:

- In January 2007, certain members of ePrize loaned it $7 million under Subordinated Secured Notes due January 31, 2009 (the "B1 Notes").

- In July 2007, certain members of ePrize loaned it approximately $7.26 million under Promissory Notes due December 31, 2008 (the "B2 Notes").
- In October 2007, certain members of ePrize loaned it approximately $2.3 million under Promissory Notes due December 31, 2008 (the "B3 Notes").
- In December 2007, certain members of ePrize loaned it approximately $11.6 million under Senior Subordinated Secured Notes due July 31, 2009 (the "B4 Notes").

These undisputed facts are alleged by Plaintiffs themselves in their Second Amended Complaint (App 54a-55a, SAC at ¶¶21-31). Although some of the B1 through B4 Notes bore conversion features, they were not converted to membership units until the March 1, 2009 recapitalization discussed below (App 111a, Linkner Affidavit at ¶9).

C. The 2009 Recapitalization

By early 2009, ePrize almost was forced to close its doors due to a series of financial blows resulting from the economic downturn. Many of ePrize's customers had radically cut or deferred their advertising budgets, which was the source of ePrize's revenue. ePrize was running out of cash to fund operations and payroll. Charter One Bank was threatening to call its loan. ePrize had also defaulted on the B1 through B3 Notes and had no means to pay them or the B4 Notes coming due in July 2009. Just the principal on the B1 through B4 Notes exceeded $28 million. ePrize was facing bankruptcy unless it could raise new cash, appease Charter One, and defer payment of the B Notes (App 111a, Linkner Aff at ¶10).

On March 1, 2009, ePrize—and over 250 jobs in Michigan—were saved by means of a corporate restructuring. As part of this transaction: i) ePrize refinanced with Charter One through a $14.5 million loan backed by personal guarantees from Defendants Gilbert, Shiffman and Hermelin;[2] ii) ePrize issued new Series C units to raise up to $5 million of additional cash; and

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2 The issues in this case do not turn on the parties' competing claims about whether the 2009 recapitalization was fair, but Plaintiffs' have made wild and unfounded assertions about ePrize members reaping benefits "in excess of 1,500 percent." In fact, to give one example,

iii) the B Notes were converted to Series B units and subordinated to the new Series C units. To acquire Series C units, a member was required to provide the following consideration:

- Make his pro rata share of an up-front capital contribution of $3,000,000;
- Agree to fund his pro rata share of an additional capital contribution up to $2,000,000;
- Fund 35% of his pro-rata share of the $14.5 million bank debt by participating with Charter One on the loan;
- Enter into a contribution agreement subjecting him to pro-rata personal liability along with the guarantors for the $14.5 million bank debt; and
- Convert all Series B notes into Series B units subordinated to the Series C Units.

This restructuring was formally approved in the Fifth Amended and Restated Operating Agreement of ePrize (App 65a-108a, the "Fifth Operating Agreement" without exhibits). Although 80% member approval was required for ratification, 99.95% of the ePrize voting members approved it. This included Frank.

In the Fifth Operating Agreement, the ePrize members approved the creation of the new Series C units and also approved the conversion of the B1 through B4 promissory notes into Series B1 through B4 units (App 68a, §§2.1-2.2). In addition, the ePrize members approved a hierarchy of payment priorities, often called a "waterfall," in §3.1. Under the §3.1 waterfall, the new Series C units were given the highest payment priority. After the Series C units were paid in

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and as Plaintiffs know from documents produced to them, Camelot-ePrize, LLC invested a total of $26,177,485 in ePrize and received only $25,121,049 from the August 2012 sale. Camelot-ePrize thus far has *lost* over $1 million, a situation that could improve if the buyer's note is paid but that never will produce a profit on the scale alleged by Plaintiffs. Plaintiffs ignore the millions invested in prior years for units that received nothing. Plaintiffs likewise ignore the risk taken by Gilbert, Shiffman and Hermelin in guaranteeing a significant share of $14.5 million in bank debt at a time when ePrize's continued existence was hanging in the balance and could have gone either way. The individual defendants did not merely invest a few million in 2009 and walk away with huge profits in 2012.

full, the Series B4 units were given the next priority, followed by the Series B-3 units, and down the line until the common units were paid, last.

All participating ePrize members, including Frank, knew in 2009 that the Series C units would receive a $68.5 million preference, as explained next.

D. Frank participates in the 2009 Recapitalization

Frank worked at ePrize from 2001-2010. In 2005 he signed a written employment agreement (App 116a-125a) with ePrize as its Senior Vice President, Strategic Services. Under this agreement, Frank was entitled to a fixed base salary (App 116a, *id.* at ¶3a) and a discretionary "transaction bonus" expressly conditioned upon him being an employee at the time the bonus was declared and paid (App 116a, *id.* ¶3b). This provision is consistent with ePrize's longstanding policy of limiting bonuses to current employees (App 113a, Linkner Aff at ¶16).

In 2009, Frank was given the opportunity to buy as many Series C units as he wanted (App 111a, *id.* ¶11). He chose to purchase 1,428 Series C units, to go with his 10 Senior Series A units, 10,000 Junior Series A units, and 768,000 non-voting common units of ePrize, as well as various voting and non-voting units of HoldCo (App 109a, *id.* ¶4). His total cash investment for these units in 2009 was about $9,200. He received some units for no money as a result of his employment, paid $5,000 to buy some units from Keith Simmons, a former member, and purchased the Series C units for $4,200 as explained further below. Frank alleges that he assigned some units in ePrize and HoldCo to IJF, an entity he controls (SAC ¶78), although ePrize was unaware of this.

ePrize eased some of the investment criteria (described in the previous section) for Frank. He was not required to participate in the Charter One loan, nor was he required to personally guaranty his share of the $14.5 million bank debt (App 111a-112a, Linkner Aff at ¶11). Instead, Frank loaned capital directly to ePrize, which repaid him in full, plus 10% interest (*id.*).

It is undisputed that Frank executed all subscription agreements required by ePrize to invest in Series C units (App 126a-144a, Frank Subscription Documents). These documents confirmed—in 2009—the essential elements of the restructuring, including the payment priority for the various classes of ePrize units and the $68.25 million preference for Series C units, ahead of all other membership units (App 143a-144a, *id.* at A-1 & A-2). Frank knew in 2009 that the Series C units would be entitled to receive at least the first $68.25 million in any sale of ePrize or its assets.

Unlike Frank's subscription agreement, which he admits receiving and signing, Plaintiffs claim that Frank never received and did not sign the Fifth Operating Agreement, but there is no genuine dispute about this. Plaintiffs rely on a signature page that happens not to be signed by Frank, but the agreement was signed in several counterparts and ePrize showed the trial court Frank's signature (App 152a, signature page), as Plaintiffs acknowledge. Nonetheless, Plaintiffs persisted below in denying that Frank ever saw the Fifth Operating Agreement, although he admittedly represented in writing on April 3, 2009 that he had been given a copy of the Agreement and that he had reviewed it carefully; that he was intimately familiar with the operations of ePrize, and that he and his representatives had had open access to all ePrize documents and records (App 135a and 141a, subscription agreement, §6(a) at pages 8 and 14).

Moreover, contradicting Plaintiffs' assertion that Frank was provided with no material suggesting that his other units would be subordinated to the Series C units, Frank admittedly received—and signed—his subscription agreements, which explained the waterfall and how it subordinated the other units (App 143a-144a, subscription agreement exhibit A, *Memorandum of Terms for Equity Recapitalization* at A-1, A-2).

Again, in the Fifth Operating Agreement, Frank and the other voting members of ePrize authorized the creation of the new Series C units and the conversion of the B1 through B4 Notes into Series B1 through B4 units (App 68a, §§2.1, 2.2). As the subscription documents explained, the §3.1 waterfall required distributions first to the Series C units until paid, second to the Series B4 units, third to the Series B3, and down the line until the common units were paid, last (App 70a-71a, *id.*, §3.1).

E. Frank voluntarily resigns and releases all claims

In the Fifth Operating Agreement, Frank and the other ePrize voting members agreed to limit the liability of the managers:

> (i) *Each Manager shall be liable solely to the Company and, derivatively, to its members for the Manager's gross negligence or willful misconduct.* The Manager's taking of any action or failure to take any action, or a Manager's errors in judgment, the effect of which may cause or result in loss or damage to the Company, if done pursuant to the provisions of the Michigan Act, the Articles of Incorporation and this Operating Agreement, shall be presumed not to constitute gross negligence or willful misconduct on the part of the manager. (App 75a, *id.*, §4.3(b); emphasis added).

The parties also agreed to a "merger clause" stating that the Fifth Operating Agreement set forth the entire understanding of the parties with respect to its subject matter and superseded all prior agreements or understandings, which were declared null and void (App 90a, *id.*, §9.8).

About 10 months after he ratified the Fifth Operating Agreement, on January 29, 2010, Frank voluntarily resigned from ePrize (App 110a, Linkner Aff at ¶6). In connection with his resignation, Frank entered into a "Separation Agreement and General Release" (App 153a, Release) with ePrize and all of its subsidiaries, affiliates, officers, directors, agents, partners, employees agents predecessors, successors and assigns. Under the Release, Frank was paid $111,000, and was entitled to receive certain defined commissions. He agreed that this was the entire amount due him under the ePrize company practices, policies or benefit plans (App 154a, *id.* at ¶10). In return for the $111,000, Frank gave a complete release:

> Employee voluntarily, knowingly and willingly releases and hereby forever discharges the Company, and its officers, directors, partners, shareholders,

> affiliates, subsidiaries, employees and agents,...from any and all charges, complaints, claims,...causes of action and demands of any nature, known or unknown, associated with Employee's employment with the Company which Employee ever had, now has or hereafter may have...arising prior to the time the respective parties sign this Agreement, including but not limited to those: in tort...; in contract, whether express or implied,...; under any Company policy, procedure or benefit plan; and under any federal, state or local law.... (App 153a-154a, *id.* at ¶6)

F. The 2012 Sale

The March 1, 2009 recapitalization, which raised $4 million of the target $5 million, coupled with major cost cutting efforts, saved the company and over 250 Michigan jobs. Given this turnaround, in 2012 the managers of ePrize were able to market the company, which sold substantially all of its assets to a third party in August 2012 (the "Sale"). By then, none of the Plaintiffs still worked for ePrize. It is undisputed that the ePrize managers distributed the Sale proceeds *exactly* as required by the §3.1 waterfall in the Fifth Operating Agreement. The Sale proceeds were sufficient to pay the Series C, Series B4, and Series B3 units in full, and the Series B2 units in part. The Series B1 units and those below them on the §3.1 waterfall received no distribution (App 112a, Linkner Aff at ¶14).

The net Sale proceeds available for distribution, after payment of bank debt, employee bonuses, and other obligations, were $99,952,891, comprised of $91,294,591 in cash and a seller note valued at $8,658,300 (*id.*). A demonstrative exhibit in the trial court (Exhibit G) provided a simplified explanation of the §3.1 waterfall and how the $99,952,891 in proceeds were distributed. That exhibit looked like this:

Summary of ePrize, LLC Distribution Waterfall

Unit Class	(A) Total Accrued Preference 1	(B) Available for Distribution
		99,952,891
Series C Preferred Units	67,124,121	67,124,121
Series B-4 Preferred Units	26,797,022	26,797,022
Series B-3 Preferred Units	3,646,547	3,646,547
Series B-2 Preferred Units	11,682,020	2,385,201
Series B-1 Preferred Units	11,384,433	0
Participating Preferred Units	0	0
Senior Series A Preferred Units	31,192,932	0
Junior Series A Preferred Units	50,485,685	0
Common Units	N/A	0
Totals	202,312,759	99,952,891

1. The Total Accrued Preference amounts listed are created and governed by the Fifth Amended and Restated Operating Agreement of Crackerjack, LLC f/k/a ePrize, LLC.

Column A ("Total Accrued Preference") sets forth the total preference attributable to each class of units as of the Sale date. The Series C preference wound up being only $67,124,121 because the final capital call on Series C units was never made. The three most senior classes of units (C, B4, and B3) received full distributions; the next class, Series B2, received only a partial distribution. Under the Fifth Operating Agreement, the managers had no discretion to make distributions in any other way.

As part of the Sale, ePrize paid a transaction bonus to certain *current* employees who had signed a transaction bonus agreement (conditioning the bonus on employment status at the time of sale). This amount was not a distribution on ownership units but incentive compensation for current employees, reportable on IRS form W-2. None of the Plaintiffs were entitled to this bonus, because none of them were employed by ePrize in August 2012.

Frank owned 0.14523% of the Series C units (1,428.33 out of 983,503.60 outstanding, for which he paid $4,200). This entitled Frank to a total consideration from the Sale of $97,483.52, consisting of $89,039.13 in cash and the right to his pro-rata portion of the seller note, which has a fair market value of $8,444.39 (App 112a, Linkner Aff at ¶15). A copy of the payment check to Frank was provided to the trial court. Frank cashed that check and never returned this money.

G. Plaintiffs bring untimely claims in 2013

Plaintiffs filed this case on April 19, 2013, more than four years after the March 1, 2009 restructuring that resulted in the new Series C units and the conversion of the 2007 loans into Series B units. The complaint was amended twice, resulting in the Second Amended Complaint (excerpts at App 50a-64a). Frank did not tender back to ePrize any portion of the money he received for his Series C units or the $111,000 he received when he left (and released) ePrize.

Plaintiffs' alleged in the SAC that the managers and others in control of ePrize conspired through the March 1, 2009 restructuring to create what they call "super-preferred equity," that is, the Series B and Series C units, with the intention of depriving other units of their value by giving the new units the highest payment priorities (App 53a-57a, SAC ¶¶ 15-49). Based on this premise—that the ePrize managers improperly created and prioritized the "super-preferred" Series B and Series C units in 2009—Plaintiffs asserted a laundry list of claims against the Defendants, including statutory oppression (Count I), breach of fiduciary duty (Count II), conversion (Count III), breach of contract (Count IV), tortious interference (Count V), conspiracy (Count VI), aiding and abetting (Count VII), fraudulent omission (Count VIII), negligent misrepresentation (Count IX), accounting (Count X), unjust enrichment (Count XI), and piercing the corporate veil (directed at Camelot-ePrize, LLC, only). Despite this multiplicity of claims, summarized by the Court of Appeals (App 43a), the Court accurately capsulized the case in its opening sentence: "This is a limited liability company member oppression case" (App

41a). As with their many claims, Plaintiffs sought every conceivable form of relief for oppression. Their prayer for relief contained 19 distinct requests, lettered "a" through "s," including these five:

c. all applicable remedies under MCL 450.4515
f. the "cancellation or alteration" of operating agreement provisions under .4515(1)(b)
g. the "direction, alteration, or prohibition of various acts" by ePrize under .4515(1)(c)
h. a buy-out at fair value, not factoring in ePrize's wrongful acts under .4515(1)(d)
i. damages under .4515(1)(e). (App 62a-63a, SAC prayer for relief).

Without exception, all counts in the SAC are premised on allegations of allegedly wrongful acts, the last of which occurred on March 1, 2009:

- "In *January 2007*, a seven million dollar convertible subordinated debenture was secretly offered to the Defendants and a select group of others."
- "In *August 2007*, another convertible subordinated debenture was offered to the Defendants and the same select group of others."
- "In *October of 2007*, another convertible subordinated debenture was offered to Defendants and the same select group of others."
- "In *December 2007*, another convertible subordinated debenture was offered to Defendants and the same select group of others."
- "The final convertible subordinated debenture offering was the [*March 1, 2009*] Series C."
- "Defendants used these subordinated debentures to expropriate economic value in [ePrize] from the minority members to themselves …."

(App 54a-56a, SAC at ¶¶21, 25, 28, 31, 37 & 38) (emphasis added).

H. The circuit court grants summary disposition and the Court of Appeals reverses as to the accrual and repose issues

ePrize filed three motions for summary disposition: first, that all claims were time-barred; second, that the Nonmember Plaintiffs lacked standing; and third, that Frank's claims were barred by release, acceptance of benefits, and consent to the 2009 Recapitalization. The circuit court ruled only on the first of these motions, agreeing with ePrize that the claims accrued in

2009 and holding further that the three years within which suit could be brought was a period of repose (App 20a-23a, 10/9/2013 hearing transcript).

Plaintiffs appealed. The Court of Appeals summarized the parties competing claims in its opinion (App 43a); summarized the facts given here (App 42a-43a); and quoted the trial court's holding (App 43a). It then turned to the question whether the claims were time-barred (App 44a).

First, it held that all of plaintiffs' claims, including its fiduciary duty and contract claims, were governed by the time periods in MCL 450.4515 (*supra* at x), *i.e.*, the period for member-oppression claims (App 44a-45a).

Next, it held that MCL 450.4515(1)(e)'s three-year period was a statute of limitation, not a statute of repose (App 45a-47a), contrary to *Baks v Moroun*. The Court noted that the statute used the word "accrual" and did not measure the period from the happening of an event like the time of occupancy or the date of a medical procedure (App 45a-46a). The Court acknowledged that shareholder oppression and member oppression claims should be interpreted consistently (App 46a fn 6 at App 49a), but concluded that *Baks* (a shareholder oppression case) did not decide a legal issue when it "called the analogous provision's limitations period a statute of repose" (App 46a-47a).

Finally, the Court held that Plaintiffs' claims did not accrue until 2012:

> Here, it was impossible for plaintiffs to establish their claims for damages in 2009 because all that occurred in 2009, if anything, was an alleged breach of the duties set forth in MCL 450.4515(1). Plaintiffs did not suffer harm until 2012, when ePrize's sale occurred and the proceeds were distributed three years later. In other words, although defendants' alleged wrongdoing occurred in 2009, plaintiffs had no claim for damages to enforce in 2009 since they had incurred none. At best, their damages were speculative… (App 47a).

The Court of Appeals declined to consider other issues raised by ePrize in the circuit court but not yet ruled upon (App 48a). ePrize sought reconsideration, which was denied.

SUMMARY OF ARGUMENT

At issue here, primarily, is the important concept of "accrual" in Michigan tort law. Although the Court has addressed accrual more than once in recent years, the issue arises in a variety of contexts and—as the Court of Appeals decision in this case shows—significant errors are still being made. The error made in this case frustrates the very purpose of statutes of limitation and repose—to prevent stale claims—by creating a special rule when "damages" are sought in a minority oppression case challenging new investments in businesses. The effect of the rule will be to delay accrual for years and years until there is a liquidating event. This potentially unlimited exposure will make it unreasonably difficult for businesses to attract new investors.

The context here—member (or shareholder) oppression—is important for the thousands of business entities in Michigan that are subject to MCL 450.4515(1)(e) (limited liability companies) and MCL 450.1541a (closely held corporations). These closely interrelated provisions dictate when oppression claims may be brought against those in control of businesses. Oppression can arise either from one specific event or over time through a pattern of conduct. For accrual purposes, it is important not to conflate a single-event oppression claim—which may have ensuing consequences over a period of time—with a series of events that must be aggregated before the tort can be said to exist.

The basic principles are well-established. A claim accrues at the time the wrong upon which the claim is based was done, regardless of the time when damage results. *Moll v Abbott Laboratories*, 444 Mich 1, 12 (1993); *Marilyn Froling Trust v BH Country Club*, 283 Mich App 264, 279 (2009); MCL 600.5827. A claim has accrued when all elements of the claim are present. *Connelly v Paul Ruddy*, 388 Mich 146, 151 (1972). It has accrued even though plaintiff does not know all the facts needed to establish the claim—they can be learned in discovery.

Solowy v Oakwood Hosp Corp, 454 Mich 214, 224 (1997). It is the fact of an identifiable loss, not the finality of money damages, that triggers accrual. *Gebhardt v O'Rourke*, 444 Mich 535, 545 (1994), citing *Luick v Rademacher*, 129 Mich App 803, 806 (1983).

Plaintiffs do not question these principles, nor can they. Nor does the Court of Appeals, which also sought to apply MCL 600.5827 and *Moll* (App 47a-48a).[3] Plaintiffs (most of the time) and the Court of Appeals both recognized that the "oppressive" act occurred in 2009, when ePrize adopted its Fifth Operating Agreement, but focused solely on the "damage" remedy sought and concluded that plaintiffs were not "harmed" until 2012, when ePrize was sold and the proceeds were distributed in accordance with the Fifth Operating Agreement's distribution "waterfall."

The trial court understood that ePrize's 2009 actions were, if harmful at all, harmful immediately. Plaintiffs' interests in ePrize were immediately subordinated to the interests of those making new investments in the business. They had the same action for damages in 2009 that they eventually filed in 2013. Even Plaintiffs concede that member oppression gives rise to a range of remedies that they could have sued for in 2009. They convinced the Court of Appeals, however, that the "damages" remedy they eventually sought had to be treated differently, as though that remedy were not available until 2012.

But a claim cannot accrue in bits and pieces. It accrues all at once, as soon as the wrong is done and there has been some identifiable harm. Once the elements are in place, the clock is ticking. That is the core teaching of *Moll*, *Connelly*, *Solowy*, and *Gebhardt*. It does not change the analysis if the cause of action has multiple remedies.

The Court of Appeals has construed the word "accrual" in these statutes to mean that actions for minority oppression and breach of fiduciary duty—in this case the subordination of

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3 *Frank v Linkner*, 310 Mich App 169, 188-190 (2015).

existing member interests to those making new investments in the business—do not accrue when the "oppression" occurs, or even when ownership interests have lost their value by a specific amount. Rather, they accrue only when there is a liquidating event such as a sale of the business.

This holding runs contrary to Michigan's existing jurisprudence, under which a claim accrues as soon as there has been a wrong that causes some harm, not the point at which damages can be calculated to the penny. Indeed, in the present case the claimed damages *could* be calculated to the penny at the time Plaintiffs' interests were subordinated, although the Court's holding would be incorrect even if that weren't so. Accrual is triggered by the fact of an identifiable loss, not the finality of money damages.

The very idea of "oppression" includes the idea of "harm." A usurpation of a company's business opportunity is oppressive to members and shareholders when it happens, not when the usurper begins to turn a profit from it. In the same way, if a subordination of minority interests is oppressive, it is oppressive when it happens, not when the new preferred equity finally derives the last drop of benefit from the change. No other test for the accrual of oppression claims is remotely workable.

Getting accrual right moots the second issue in ePrize's application, namely the MCR 7.215(J) error in failing to follow the 1998 holding in *Baks v Moroun* that these are statutes of repose. This Court, of course, is not bound by *Baks*, a case that has been both followed and criticized on this issue. The criticism focuses on the statute's use of the word "accrual," but that word is needed because oppression may result from a course of conduct over time. The *Baks* holding is rooted in this Court's decision in *Detroit Gray Iron & Steel Foundries, Inc v Martin*, 362 Mich 205 (1961). If *Gray Iron* remains the law, *Baks* reached the right result.

ARGUMENT

I.

A CAUSE OF ACTION FOR OPPRESSION ACCRUES AS SOON AS ALL ELEMENTS ARE IN PLACE AND CAN BE PLEADED

Plaintiffs' oppression claims accrued in March 2009 and the Court of Appeals contrary published holding—if not corrected—will extend potential liability for years beyond the intent expressed in the statute, with unintended consequences for Michigan businesses and investors.

A. The standard of review is de novo

The parties agree that the standard of review is de novo. MCR 2.116(C)(7) requires summary disposition of all or part of a claim if "[t]he claim is barred because of…statute of limitations." A motion for summary disposition under MCR 2.116(C)(7) does not test the merits of a claim, but rather tests the necessity for a trial on the merits. "In the absence of disputed facts, the question whether a cause of action is barred by the statute of limitations is also a question of law." *Boyle v General Motors Corp*, 468 Mich 226, 229-230 (2003); *Moll*, 444 Mich at 26. Under MCR 2.116(G)(5), the affidavits, pleadings, depositions, admissions and documentary evidence filed with the motion are to be considered.

Whether a claim is within the period of limitation is a question of law for the court when no facts are in dispute. *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 386 (2007). ePrize contends that all of Plaintiffs' claims are governed by MCL 450.4515 and 450.4404, which in both cases is three years or less. The Court of Appeals held that Plaintiffs' fiduciary duty claims did not differ materially from their member oppression claims and were all governed by MCL 450.4515 (App 45a). The Court also noted that company managers owe their fiduciary duties to the company, not individual members (App 44a, *citing The Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 43 (2005)).

B. Plaintiffs' claims accrued in March 2009, not August 2012

Whether the three-year period of MCL 450.4515(1)(e) (*supra* at x) is one of limitation or repose, all of Plaintiffs' claims are time-barred[4] because either way the period began to run in 2009 and expired in 2012, well before Plaintiffs filed this action in 2013.

1. The accrual of oppression claims does not hinge on the remedy sought

Plaintiffs sought every possible remedy under MCL 450.4515, including the cancellation of the Series C units, the banning of distributions in accordance with the operating agreement's "waterfall," a buy-out at a fair price (as though there were no Series C units), and damages (App 63a, SAC prayers for relief c, f, g, h, i). These are all equitable remedies, including buy-outs and damages. This Court recently clarified that damages are an equitable remedy in the context of the shareholder oppression statute, *Madugula v Taub*, 496 Mich 685 (2014), and the LLC oppression statute is precisely analogous, as the Court of Appeals recognized (App 46a fn 6 at App 49a).

The Court of Appeals (and Plaintiffs) wrote as though the limitations period began sooner for their "equitable" claims than it did for their "damages" claim, but there is only one point of

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4 The Court of Appeals held that all of Plaintiffs' claims, including their alleged breach of contract and breach of fiduciary duty claims, mirror their member-oppression claims and therefore are subject to the time periods in MCL 450.4515 (App 441-45a). ePrize agrees and did not raise any such issue in this Court. More importantly, Plaintiffs did not cross-appeal. Consequently, Plaintiffs are now bound by the Court of Appeals' decision and their failure to cross-appeal precludes review in this Court. *McCardel v Smolen*, 404 Mich 89, 95 n6 (1978) ("A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he may not attack it even on grounds asserted in the court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him," quoting *LeTulle v Scofield*, 308 US 415, 421-22; 60 S Ct 313 (1940)).

Similarly, not before the Court now is the Plaintiffs's extensive argument in opposing leave to appeal on these points: whether Frank received, reviewed, and signed the Fifth Operating Agreement (the Court of Appeals assumed so and Plaintiffs failed to cross-appeal); whether Plaintiffs had an "oral contract" with a longer statute of limitation (contrary to the Court of Appeals and, again, no cross appeal); whether a 2005 conversion of ePrize membership units to ePrize Holdings units actually occurred (clearly time-barred issue in this 2013 lawsuit), and whether there was fraudulent concealment (an issue never pleaded and not yet addressed by any court).

accrual for any of these claims. If adopting the 2009 distribution waterfall was wrongful, those Plaintiffs with standing did not need a liquidating sale event to seek its cancellation, enjoin a distribution, force a buy-out, or seek money damages for the diminished value of their units—the value was diminished in 2009.

It is not possible to separate "damages" from all the other remedies available to a plaintiff in an oppression case and say "Well, the rest of the remedies may be time-barred now, but not damages—the clock only started on that one in 2012." The diminution in value damaged Plaintiffs immediately, if at all, and a buy-out is a damage remedy, just like any other. ePrize finds no published authority for this common-sense proposition, but the Court of Appeals has so held in an unpublished opinion. *Irish v Natural Gas*, 2006 WL 2000132, *3 (Mich App 2006) (Tab A) (buy-out is a damage remedy).[5] There is no difference here between an action for buy-out and an action for damages.

Potential litigants need to know when the clock starts running on a particular cause of action. Plaintiffs need to know the date by which they must bring suit. Defendants need to know the date by which a claim is time-barred. For all participants in the litigation process, clarity is possible only if there is a *single* date of accrual. It may be easy (specific event) or difficult (pattern of conduct) to determine, but it has to be ascertainable so that a court can definitively rule whether a cause of action is timely or time-barred.

2. The wrong to Plaintiffs, if any, occurred when ePrize units were subordinated in 2009

The oppression alleged in this case was the adoption in 2009 of the Fifth Amended

5 Plaintiffs argued to the trial court that its proposed "buy out" remedy had a *different* limitations period than a claim seeking money damages, citing *Estes*. But the *Irish* case (Tab A) illustrates that the limitation period is the same. The Court in *Irish* noted that the language Plaintiffs rely on in *Estes* was mooted by the Legislature in 2001 when it enacted the three year/two year periods (*id.*). A claim under the oppression statutes seeking a buy-out as a remedy is a claim for damages subject to the three-year/two-year time limits. *Id.*

Operating Agreement's "waterfall" of distribution priorities, which guaranteed that holders of junior preferred and common ePrize units would never receive a pro rata share of any liquidation proceeds until the holders of Series C Units received the first $68.25 million, thus diminishing the proceeds by that extent, no matter what the total was. This alleged oppression—if proved—would have immediately damaged Plaintiffs, triggering accrual under the statute at issue here:

> (e) ...An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued or within 2 years after the member discovers or reasonably should have discovered the cause of action under this section, whichever occurs first. MCL 450.4515(1)(e) (full text *supra* at x).[6]

Damages are one of many remedies available if oppression has been proved. Plaintiffs' claims for all remedies were ripe in 2009, including their damages/buy-out claim for the diminution in value of their ePrize units caused by the new Series C Units.

Plaintiffs' allegations of harm all relate to events occurring no later than 2009, four years before they filed this action (App 54a-60a, SAC at ¶¶21-38, 47, 96-97, 111). Their claims accrued at "the time the wrong upon which the claim is based was done regardless of the time when damage results." *Marilyn Froling Trust*, 283 Mich App at 279. The alleged "wrong" was the adoption in 2009 of the new operating agreement, with its new preferred Series C units. If there was a "wrong," all the damage was immediate.

Any loss incurred by Plaintiffs was incurred in 2009. The Series B units created then merely converted the 2007 loans, which would have had to have been repaid first anyway, to membership units with priority over any units held by Plaintiffs. As for the Series C Units, whose holders invested new money in 2009 and personally guaranteed millions in bank debt, they received a $68.25 million priority over both the Series B units and the older junior preferred

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6 This provision is identical to its counterpart in the Michigan Business Corporation Act. The corporate "oppression" statute, MCL 450.1489(f), contains the same 3 year/2 year limitation periods. The Court of Appeals expressed no doubt that Michigan precedent interpreting MCL 450.1489(f) applies equally to MCL 450.1541a(4) (App 46a fn 6 at App 49a).

and common units. Immediately, putting the Series B units aside, this new priority reduced the value of Plaintiffs' units by their pre-2009 pro rata share of $68.25 million dollars. This was their alleged "damage." It was no more difficult to calculate in 2009 than it would have been after 2012. No matter how much the value of ePrize might increase later, Plaintiffs could make exactly the same claims in 2009 that they eventually made in 2013.

If Plaintiffs wished to "cancel or alter" the new operating agreement, their litigation clock started running in 2009. If they wanted to "prohibit" ePrize from making a priority distribution to Series C units, their clock started running in 2009. If they wanted a "buy out" at fair value, without the Series C priority, their clock started running in 2009. And if they wanted money damages for the diminution in value of their units, that clock started running in 2009 as well. Under any measure, 2012 has nothing to do with accrual here.

The Court of Appeals, like the circuit court, did not reach any knowledge-based issue, so its decision was not based on what Plaintiffs knew in 2009. The only Plaintiffs with standing (Ivan Frank and Blake Atler) had full knowledge in 2009; the others were not even members of ePrize, so their knowledge does not matter.[7] The Court of Appeals opinion is premised *solely* on the incorrect contention that "Plaintiffs did not suffer harm until 2012, when ePrize's sale occurred" (App 47a). But the economic effect in 2009 was the same as if the Series C investors had taken $68.25 million in ePrize equity right then and removed it from the company, permanently out of the reach of the holders of junior preferred and common members.

The Court of Appeals cites the general rule of MCL 600.5827 and *Moll*, 444 Mich at 12, that a claim accrues "at the time of the wrong upon which the claim is based was done *regardless*

[7] In any event, Plaintiffs are precluded under *Trentadue*, 479 Mich at 389, from tolling the three-year period through application of the "common-law" discovery rule. *Trentadue* abolished the common-law practice of tolling accruals based on allegations that a claimant could not have reasonably discovered the claim sooner. Discovery serves only to ***shorten*** the limitations period from three years to two. MCL 450.4515(1)(e).

of the time when damage results" (App 47a; emphasis added). The Court then cites an unhelpful general definition from *Black's Law Dictionary*, which in turn quotes a California treatise. The definition is not wrong, but is too general to advance the analysis. Next the Court cites, with a "*cf*" signal, a civil rights action under 42 USC §1983 brought in Ohio by a death-row prisoner against the governor, *Cooey v Strickland*, 479 F3d 412 (CA 6 2007). The Court of Appeals' quote from *Cooey*—which supports ePrize, not Plaintiffs—needs context.[8] The *Cooey* panel reversed a district judge for finding that a method-of-execution challenge was timely filed and ruled instead that it was time-barred.

The only other authority cited by the Court of Appeals as concerning accrual is not a statute of limitation case at all. *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483 (1988), concerns several other issues, including the well-known principle that damages need not be proved to a higher degree of certainty than the nature of the case admits. *Id.* 511-512. There was nothing "speculative," however, about Plaintiffs' oppression cause of action in 2009. The new operating agreement was adopted—Frank voted for it—and those who invested new capital were given new rights that allegedly violated promises made to Plaintiffs that their rights would never be diluted or subordinated. No matter when or for how much ePrize ultimately was sold, Plaintiffs (other than Frank, who owned Series C units) always were going to get nothing until

8 Cooey claimed that Ohio's lethal injection protocol was cruel and unusual punishment. The Sixth Circuit applied a two-year statute of limitation and federal accrual law. *Id.* 416. In 2001, years after Cooey was sentenced to death, lethal injection became Ohio's sole method of execution. *Id.* Cooey exhausted his direct appeal in 1993 and federal habeas in 2003, then filed suit in 2004. *Id.* 417-418. The trial court held that Cooey's clock began to tick "when his execution became imminent and he knew or had reason to know of the facts that gave rise to his specific method-of-execution challenge." *Id. 417.* The court defined "imminent" to mean when all avenues of sentence relief were exhausted. *Id.*

The Sixth Circuit rejected that analysis, including the holding that the execution had to be imminent. *Id.* 419-424. The Court held that the action accrued at the end of the state appeal process, without further delay for federal habeas, except that in this case the execution method was adopted later, although still more than two years before Cooey filed his action.

$68.5 million went to others.

The Court closed with two additional points. It observed that the new operating agreement might have been amended again or that ePrize might have become worthless (App 48a). These are poor points. First, the existence of a cause of action can never depend on speculation about future hypotheticals that might affect the outcome of the action. If that were permitted, no cause of action would ever accrue. Second, the two future scenarios hypothesized by the Court of Appeals are easily answered.

If ePrize had become worthless, all of its members would have lost their investments and Plaintiffs would be unable to recover for the damages they incurred in 2009 when ePrize allegedly "stole" over $100 million in equity (the new Series C units and the conversion of Series B loans into senior Series B units). That, however, is an argument for bringing suit sooner, not later. From Plaintiffs' perspective, that equity was gone in 2009, immediately and irretrievably. It was no more "gone" in 2012 than it was in 2009.

Moreover, ePrize could not amend its operating agreement to deprive the holders of Series C and B units of their promised priority over the holders of older units. The holders of Series C units made a very risky investment in a company on the brink of disaster in 2009. They did so in part because ePrize made binding promises to them that they would have priority if there was a distribution. They performed fully by investing all requested sums and their right to priority was vested. Similarly, the 2007 Series B Note holders agreed to forgo the repayments owed them in exchange for equity units with tiered priority, below Series C but ahead of all older units.

The application of limitation periods is a question of law where the facts are not in dispute. *Terrace Land v Seeligson*, 250 Mich App 452, 455 (2002). Here, the alleged breach (adoption of the §3.1 waterfall and its distribution preferences), the alleged harm (dilution of

Plaintiffs' units), and the alleged "wrong" were all complete no later than April 3, 2009. All elements of a cause of action, if any, were present then. *Connelly*, 388 Mich at 151.[9] As of April 3, 2009, it was assured that Plaintiffs (other than Frank, who invested and was paid) would not see a penny of the first $100 million or so received in any future distribution. The economic impact on common and junior preferred units was immediate and immediately quantifiable. These claims—including whatever money damages Plaintiffs would ever have—all accrued in 2009.

Plaintiffs' "accrual" analysis is inconsistent with *Marilyn Froling Trust*. *Froling* "completely and retroactively abrogated the common-law continuing wrongs doctrine in the jurisprudence of this state" (283 Mich App at 288). Plaintiffs cannot revive an untimely claim by treating the drop of the proverbial "other shoe"—the 2012 liquidation—as a fresh act of oppression. It was no such thing. ePrize simply acted in accordance with the requirements of its own 2009 operating agreement, as it was bound to do. To say that there was no oppression until 2012 is to say that there was no oppression in 2009, not because the operating agreement might have been amended yet again or because ePrize might have become worthless, but because there is never anything oppressive about a control group making a business judgment that it is in the best interests of the company to obtain needed capital by giving a distribution priority to new

9 Plaintiffs misconstrue *Connelly*, a negligence case resulting from an industrial accident. The alleged negligent acts—the preparation, design, repair, and delivery of a press—occurred years before Connelly's injury. This Court held that Connelly's claim did not accrue until she was injured because she was unable to establish the element of harm before that time. 388 Mich at 151. Although plaintiff was not harmed until she was injured, Plaintiffs here were harmed, if at all, when ePrize created new senior units and a payment priority waterfall that spelled out what was to occur in the event of a distribution. Connelly was harmed when she was injured, and Plaintiffs were harmed when *they* were injured, which in their more candid moments they admit is when the units they claimed to own were diluted. There is nothing "speculative" about the events of 2009. Connelly had no personal injury claim just because there was a faulty press in her workplace, but Plaintiffs had their oppression claim, for whatever it was worth, in 2009.

investors at the expense of the owners of older units. In fact, in this case, there was no oppression ever. The new investment was all that saved the company and was risky for the investors. But accepting Plaintiffs' claims as pleaded, there is no doubt *when* the alleged oppression—*and the alleged damage*—happened. It happened in 2009.

In 2009, Plaintiffs' claims were ripe for litigation. The value of the common and junior preferred ePrize units had been diminished by an easily calculated amount. If all those units were worth "x" dollars right before the creation of the Series C and B units, they were collectively worth x minus "y" dollars the next day, with "y" equaling $68.25 million.[10] If that diminishment in value of the previously existing ePrize units was wrongful oppression, the holders of those units were damaged by their pro rata share of the diminishment. It's just arithmetic, no different in 2012 than in 2009. "[P]laintiff need not be able to prove each element of the cause of action before the statute of limitations begins to run." *Solowy*, 454 Mich at 224.

> It is not necessary that a party should know the details of the evidence by which to establish his cause of action. It is enough that he knows a cause of action exists in his favor, and when he has this knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecuting or preserving his claims. *Kroll v Vanden Berg*, 336 Mich 306, 311 (1953).

As the ICLE treatise, *Guide to Michigan Statutes of Limitations (January 2015 Update)*, explains in §1.4, the *extent* of damages is immaterial. "It is…the fact of an identifiable and appreciable loss, and not the finality of monetary damages, that gives birth to the cause of action." *Luick*, 129 Mich App at 806, cited by *Gebhardt*, 444 Mich at 545. No case anywhere supports the Court of Appeals' accrual analysis. *See Berrios v Miles, Inc*, 226 Mich App 470

[10] The $68.25 million number in the 2009 Fifth Amended Operating Agreement assumed that ePrize required a full $5 million in new capital contributions. It did not, so in the 2012 distribution under the §3.1 waterfall, the final figure for the Series C units was $67,124,121 (Trial Exhibit G, reproduced *supra* at 8). The Series B units added another $53.5 million with priority over junior preferred and common units, but that money already was a priority debt owed to the Senior Secured Notes issued in 2007.

(1997) (hemophiliac's cause of action accrues when he knows blood transfusion probably caused him to be HIV-positive, even if AIDS does not develop for seven more years, applying *Moll*'s "possible cause of action" standard).

Other jurisdictions agree. Consider the counterclaims in *Schnelling ex rel Bankruptcy Estate of Epic Resorts, LLC v Prudential Securities, Inc*, 2004 WL 1790175 (ED PA 2004) (Tab B), where counter-plaintiff alleged that it sold its portfolio of receivables in 2004 at a loss of $13 million after counter-defendants gave them false financial statements, which it knew in 2001 were false. *Id.* at *2. The Pennsylvania accrual rule tracks ours. The damage occurred in 2001 when counter-plaintiff knew it had been harmed, not in 2004 when it formally realized the loss.

> The damage to [counter-plaintiff] occurred when it became aware that the escrow accounts were not created in June 2001. At that point...[defendants] should have known that [counter-defendants'] allegedly tortious actions would negatively impact the value of its portfolio of receivables.... The fact that [counter-plaintiff] did not formally realize the $13 million loss until March 2004 does not delay the running of the limitations period. A contrary holding would "effectively enable similarly situated parties *to forestall the running of the statute of limitations indefinitely*." *Id.* (emphasis added).

As the district court explained further in a footnote, counter-plaintiff "suffered actual legal damage in the diminution in value of the time-share receivables due to [the] allegedly tortious conduct long before the receivables were sold in March 2004." *Id.* *2 n.3.

By focusing on the liquidating event, the Court of Appeals effectively has prevented the statute of limitations from even beginning to run until that event occurs, no matter how long the wait is. In this case, ePrize by happenstance was sold in 2012, but it might not have been sold for many more years. Under the Court's reasoning, Plaintiffs never could sue for the 2009 "oppression" until ePrize was sold, even though there was never any change in the diminution of their equity and there was nothing "speculative" about that. From ePrize's viewpoint, the oppression claim would remain a ticking time bomb, just waiting to go off whenever there was a distribution of equity for any reason. If ePrize were not sold until 2212, the distant descendants of these Plaintiffs would have three more years to sue the descendants of these Defendants. If Michigan law sanctioned such unlimited exposure on investment-related claims, our businesses would have a hard time attracting new investors. And the very purpose of such statutes—to prevent stale claims—would be frustrated.

II.

MCL 450.4515 IS BOTH A STATUTE OF REPOSE AND A STATUTE OF LIMITATION

If this Court agrees with ePrize that Plaintiffs' claims all accrued in 2009, it need not consider this second issue. If the Court wishes to settle the law on whether MCL 450.4515(1)(e) contains a statute of repose, it should hold consistently with its own 1961 decision in *Detroit Gray Iron* and the Court of Appeals' 1998 decision in *Baks v Moroun* that laws of this kind contain both periods of repose and limitation. Either way, the Court of Appeals' error in failing to follow the conflict resolution procedure of MCR 7.215(J) should be noted, although it no longer affects the outcome.

A. The standard of review is de novo

Decisions regarding the meaning of a statute or a court rule are both legal questions, which this Court reviews de novo. Authorities appear in subsection A of the first argument. Whether MCL 450.4515(1)(e) sets forth a statute of repose or limitation is such a question.

B. The use of the word "accrued" in MCL 450.4515(1)(e) does not mean that it cannot include a repose period, and the "whichever occurs first" phrase means that it is both a statute of repose and a statute of limitation

The Court of Appeals in this case seized on the word "accrued" in holding that "[t]here is no doubt that [MCL 450.4515(1)(e)] is a statute of limitation" (App 45a). Its analysis of the issue consists of listing other statutes of limitation that use some form of the word "accrue," and then contrasting those with the statutes of repose for claims against contractors and medical malpractice (App 46a), which run from the date of occupancy and the date of the act or omission, respectively. But there is no established bright-line test that the word "accrued" negates any possibility that a statute intends to state a period of repose.

As noted earlier, oppression of a minority by those in control of a business, by its nature, can be "a continuing course of conduct," a "series of actions," or "a significant action." These definitions are contained in the very statute at issue here. MCL 450.4515(2) (quoted *supra* at x). That means there will not always be one event to provide a starting point for a period of repose. It does not mean that MCL 450.4515(1)(e) does not contain a period of repose. In oppression cases that mature only through a course of conduct, there is no avoiding the word "accrue."

An action for minority oppression "must be commenced within 3 years after the cause of action…has accrued or within 2 years after the member discovers or reasonably should have discovered the cause of action…, whichever occurs first." If the three-year period were merely a statute of limitation, the two-year period after discovery would be pointless unless it was a means to *lengthen* the time available in instances where it was reasonable for plaintiff not to be aware of the cause of action. But MCL 450.4515 does exactly the opposite. It *shortens* the time available when plaintiff is chargeable with knowledge that the clock is ticking. Why, then, are there two periods of time at all? The answer is that the longer period is one of repose, an outside limit after which suit may not be brought at all.

That was the conclusion this Court reached 55 years ago when it decided *Detroit Gray Iron & Steel Foundries, Inc v Martin*, 362 Mich 205 (1961). In *Detroit Gray Iron*, the alleged wrongful conduct began in 1929 and was certainly concluded by 1942, 16 years before suit was filed in 1958.The times were different then—Michigan had no Court of Appeals, this Court's lead opinions sometimes were printed last, and there was no LLC Act—but it was still the public policy of Michigan that company decision-makers should not be susceptible to suit for those decisions indefinitely. That policy was reflected then in §47 of the Michigan General Corporation Act, CL 1948, 450.47 (Stat Ann 1959 Cum Supp §21.47):

> No director or directors shall be held liable for any delinquency under this section after 6 years from the date of such delinquency, or after 2 years from the time when such delinquency is discovered by one complaining thereof, *whichever shall sooner occur*. 362 Mich at 208, quoting the statute (opinion of Kelly, J) (emphasis added).

This Court noted that the phrase stressed in the quotation above "radically alters the periods of limitations which would otherwise apply to actions against directors either for negligent conduct or fraud." 362 Mich at 217 (opinion of Souris, J). If suit was not brought within six years, the shareholder had to "forever bear the loss."

That is why later-to-be-Chief-Justice Taylor reached the same conclusion 37 years later in *Baks v Moroun*, 227 Mich App 472, 481-484 (1998), *overruled in part on other grounds by Estes v Idea Engineering*, 250 Mich App 270 (2002). In *Baks*, minority shareholders in a closely held family corporation brought oppression claims (along with several other claims raised by Plaintiffs in the present case) against the controlling shareholder, their brother. Oppression was sought to be remedied under MCL 450.1489. Plaintiffs alleged that all of their claims had been fraudulently concealed by their brother. The *Baks* panel's error in thinking that the oppression statute did not create a distinct cause of action was corrected four years later in *Estes*.

For present purposes, however, what matters is the untouched holding that the Business Corporation Act's counterpart to the statutory provision at issue here, BCA §541a(4), provides for a period of repose, based on the authority of *Detroit Gray Iron*. *Baks*, 227 Mich App at 481-484. In 1998, the oppression statute itself did not contain specific periods of limitation or repose, and it was necessary to look elsewhere. *Baks* affirmed the trial court's summary dismissal of all the plaintiffs' statutory and common law claims:

> [W]e agree with defendants that the trial court properly held that § 541a(4) establishes the period of limitation for ***all*** actions filed against corporation officers and directors alleging conduct that violates the standard found in § 541a or its common-law antecedents.
>
> ***
>
> [A]ny action for breach of fiduciary duty against a corporate officer or director, whether under § 489 or otherwise, is subject to the period of limitation set forth in § 541a(4) if the action alleges conduct that violates the standard of conduct for directors and officers found in § 541a(1).

Baks, 227 Mich App at 484-485. Under the rule established in *Detroit Foundries* and reaffirmed in *Baks*, MCL 450.4515(1)(e) governs ***all*** claims against limited liability company managers or members, no matter how the claims are labeled, characterized or described in the claimant's pleading.

In the court below, the Court of Appeals sought to draw support from Judge Hoekstra's dissenting opinion in *Baks*, which did not address the repose/limitation issue (App 46a-47a). But Judge Hoekstra had no occasion to consider the repose issue because he would have applied a *six*-year statute of limitation, not BCA § 541a(4), making the nature of the limitation irrelevant. 227 Mich App at 500.

The *Baks* decision on this issue has been published precedent in Michigan for 17 years now. *Detroit Gray Iron* has been published precedent for 55 years. Over the years, the length of the periods has changed (the current period of limitations/repose for oppression actions dates back to 2001), among other changes, but the legislature has not seen fit to amend either this statute or the analogous BCA statute on the point at issue here. There is no published precedent since *Baks*, and only a handful of even unpublished or federal decisions.

For example: *Schafer & Weiner, PLLC v Estate of Schafer*, No. 2008-320,768-CZ (Oakland Probate Ct 2009) (Opinion of Pezzetti, J) (Tab C at 8) ("Plaintiffs' claims…are claims under MCL 450.1451a and MCL 450.4404, no matter how Plaintiffs attempt to characterize their individual counts.... As such, Plaintiffs' claims...are *all* subject to the statutes of repose set forth in MCL 450.1451a(4) and 450.4404(6)" (emphasis by the court)).

Federal decisions like, *Techner v Greenberg*, 553 Fed Appx 495 (2014) (applying Michigan law) (Tab D) acknowledge that the *Baks* holding is a holding, even when they disagree with it and speculate about what this Court might think. Applying MCL 450.4515, the Sixth Circuit held that plaintiff's oppression claim accrued in 2003 when wrongful distributions occurred, ten years before commencement of her suit. The difference between *Techner* and the present case is that no harmful act *preceded* the distributions. In *Techner*, "the harm suffered by [plaintiff] (the failure to receive proper distributions...) occurred at the same time that the defendant's wrong (the failure to ensure proper distributions) was perpetrated." *Id.* at 506. In the present case, of course, ePrize's 2012 distributions merely carried out the instructions in the 2009 operating agreement.

In *Detroit Gray Iron*, the alleged wrongdoing began in 1929 when a sweetheart lease between entities with common directors was signed and continued until 1942, when there was a merger. No lawsuit was filed until 1958 and, of course, this Court agreed with the trial court that it was time-barred. The alleged liability for particular acts of those with controlling interests in companies cannot be permitted to linger on forever without being tested in the litigation process. The rule created by the Court of Appeals in this case would do that. Michigan's statute of repose, coupled with a proper understanding of accrual, is intended to prevent it.

CONCLUSION AND RELIEF REQUESTED

For these reasons, ePrize respectfully requests that this Court hold that a cause of action for minority oppression accrues at the time the members recapitalize the company in a manner alleged to oppress the minority, not years later when the company is liquidated and distributes assets as required by the earlier recapitalization, and that it reverse the Court of Appeals' contrary decision and reinstate the circuit court's decision.

JAFFE RAITT HEUER & WEISS, PC

By: /s/ Brian G. Shannon
Brian G. Shannon (P23054)
R. Christopher Cataldo (P39353)
Attorneys for Appellants other than
Daniel Gilbert and Jay Farner
27777 Franklin Road, Suite 2500
Southfield, MI 48034
(248) 351-3000
bshannon@jaffelaw.com

MORGANROTH & MORGANROTH, PLLC

By: /s/Jeffrey B. Morganroth
Jeffrey B. Morganroth (P41670)
Attorney for Daniel Gilbert and Jay Farner
344 N. Old Woodward Ave., Ste. 200
Birmingham, MI 48009
(248) 864-4000
jmorganroth@morganrothlaw.com

Dated: April 20, 2016

3409666.v1

TAB A

2006 WL 2000132
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Randy IRISH, Plaintiff–Appellant,
v.
NATURAL GAS COMPRESSION SYSTEMS, INC., Craig Anderson, William Jenkins, Tracy Larsen, Ian Phair, Mark Ritola, James Sanor, Richard Sheteron, James Stricker, A.J. Yuncker, and Colleen Yuncker, Defendants–Appellees.

Docket No. 266021. | July 18, 2006.

Synopsis
Background: Former shareholder brought action against company and its directors alleging shareholder oppression and breach of contract following a "squeeze-out" merger. Company moved for summary disposition asserting a statute of limitations defense and alleging failure to state a claim. The Circuit Court, Grand Traverse County, granted the motion. Shareholder appealed.

Holdings: The Court of Appeals held that:

[1] former shareholder did not have standing to bring action alleging shareholder oppression;

[2] appraisal was the exclusive remedy available to former shareholder; and

[3] limitations period for claims seeking damages applied.

Affirmed.

West Headnotes (3)

[1] **Corporations and Business Organizations**
⚷Persons entitled to sue; standing

Former shareholder of company did not have standing to bring action alleging shareholder oppression against company and its directors following a merger designed to eliminate the former shareholder's shares, where former shareholder did not have shareholder status at the time of the action, as required by statute governing such actions. M.C.L.A. § 450.1489.

Cases that cite this headnote

[2] **Corporations and Business Organizations**
⚷Exclusive remedy

The exclusive remedy available to former shareholder alleging shareholder oppression against company and its directors following a merger designed to eliminate the former shareholder's shares was to request appraisal as a dissenting shareholder in order to address his claim that he received less than the fair market value for his stock; even though company did not mail shareholder notice of annual meeting concerning the merger vote, the merger was not unlawful or fraudulent as might allow for an alternative remedy. M.C.L.A. § 450.1762(1)(a), (3).

1 Cases that cite this headnote

[3] **Corporations and Business Organizations**
⚷Estoppel, waiver, limitations, and laches
Limitation of Actions
⚷Securities; corporations

Three-year limitation period from accrual, or two-year limitation period from discovery, of claims seeking damages for shareholder oppression, rather than six-year limitation period applicable to claims seeking equitable relief, applied to former shareholder's action against company, even though shareholder ostensibly requested equitable relief, where shareholder sought to have company compelled to purchase his shares at fair value, which amounted to a claim for damages. M.C.L.A. §§ 450.1489(1)(f), 600.5813.

2 Cases that cite this headnote

Grand Traverse Circuit Court; LC No. 05–024788–CK.

Before: NEFF, P.J., and BANDSTRA and ZAHRA, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 Plaintiff appeals by right from the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(7) (statute of limitations) and (8) (failure to state a claim). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was a founding director and stockholder in Natural Gas Compression Systems, Inc. (Natural Gas Compression) and owned 13.2 percent of its stock. In September 2002, a change in the capital structure of Natural Gas Compression was proposed that involved eliminating plaintiff as a shareholder by means of a "cash out" merger and merging NGCS, Inc., an independent corporation, into Natural Gas Compression. The merger provided that investors who had been terminated as directors or employees, of whom plaintiff appears to be the only one, were ineligible to receive stock in the surviving company and would receive $0.39 for each of their existing shares. This price was calculated as the average of the stock's (1) equity value of $0 per share, (2) price to book value of $1.59 per share, and (3) price to earnings value of $0.22. Non-terminated founding member shareholders received shares in the new corporation. The per-share liquidation preference for the stock in the new company was $14.63, which is the original subscription price paid by outside investors whose shares were converted into priority stock in the resulting corporation.

At the Natural Gas Compression's annual shareholder meeting on September 5, 2002, 84.7 percent of the eligible shares were voted in favor of the merger. Plaintiff claims that he did not receive notice of the meeting until after it occurred so that he was unable to vote his stock against the merger. However, plaintiff's 13.2 percent of the stock would not have altered the approval of the merger because the merger required only a 71 percent affirmative vote.

Under the terms of the merger documents, plaintiff's shares were canceled. On October 21, 2002, Natural Gas Compression mailed a check to plaintiff for his canceled shares based on the per share value of $0.39. On October 29, 2002, plaintiff returned the check, stating that he believed the company's actions were illegal and oppressive, and he intended to find legal representation to protect his rights. Natural Gas Compression sent the check back to plaintiff. Plaintiff's attorney then sent letters to Natural Gas Compression demanding that plaintiff be paid $14.63 per share for his canceled stock.

Natural Gas Compression's financial position improved after plaintiff was "squeezed out". Net profits before taxes for the year ending July 31, 2002, were $24,937. Net profits before taxes for the year ending July 31, 2005, were $3,471,761.

Plaintiff did not contact Natural Gas Compression again until he filed his complaint on August 24, 2005, which was two years and ten months after he rejected the check from Natural Gas Compression and retained counsel. In his complaint, plaintiff alleged a count of shareholder oppression under MCL 450.1489 and a count of breach of contract.

*2 Defendants moved for summary disposition under MCR 2.116(C)(7) (statute of limitations) and MCR 2.116(C)(8) (failure to state a claim of shareholder oppression under MCL 450.1489). At the hearing on defendants' motion, the trial court found that a "squeeze-out" merger is lawful in Michigan, that plaintiff did not show that the merger violated any contractual relations, and that plaintiff's votes were effectively voted against the merger because the merger documents required only affirmative votes to pass. The court concluded that plaintiff had no standing to assert a claim for shareholder oppression under MCL 450.1489 because he was not a current shareholder and that after the merger plaintiff failed to exercise his exclusive appraisal remedy as a dissenting shareholder under MCL 450.1762 and MCL 450.1772. The trial court also concluded that plaintiff's claim was barred by the two-year limitation period under the discovery rule in MCL 450.1489(1)(f) because plaintiff did not sue defendants until August 24, 2005, two years and ten months after he knew, when he returned the check on October 29, 2002, that he had a claim against Natural Gas Compression.

Plaintiff appeals by right claiming that he timely and properly brought his claim under MCL 450.1489. We disagree.

[1] This Court reviews de novo an appeal from an order granting summary disposition. *Bryant v. Oakpointe Villa Nursing Ctr, Inc,* 471 Mich. 411, 419, 684 N.W.2d 864 (2004). The trial court did not err in concluding that plaintiff did not state a claim under MCL 450.1489 because plaintiff is not a shareholder and has no standing under MCL 450.1489 and because plaintiff's exclusive remedy is an appraisal action under MCL 450.1762(3) and MCL 450.1772.

MCL 450.1489(1) provides that "[a] shareholder may bring an action in the circuit court ... to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder."Under MCL 450.1109(1), a "shareholder" is a "person holding units of proprietary interest in a corporation.""Holding" is a present active participle, modifying shareholder and, accordingly, means a current shareholder, i.e., holding the shares in the present. Further, in *Estes v. Idea Engineering & Fabricating, Inc.,* 250 Mich.App. 270, 282, 649 N.W.2d 84 (2002), this Court stated that "plaintiffs in a § 489 suit may only be current shareholders."Because plaintiff's shares were canceled incident to the September 5, 2005 merger, plaintiff ceased being a shareholder and was not a current shareholder when he sued defendants on August 24, 2005. Therefore, plaintiff did not have standing to sue under MCL 450.1489.

[2] Further, plaintiff was limited to an exclusive appraisal remedy for his claim that he received less than fair market value for his stock. Plaintiff had the right to dissent from the corporate merger. MCL 450.1762(1)(a). However, a shareholder's remedy for such a corporate action is limited to dissent and an appraisal. A shareholder may not actually challenge the corporate action, unless the action is unlawful or fraudulent with respect to the shareholder or the corporation. MCL 450.1762(3).

*3 Plaintiff did not show that the merger was unlawful or fraudulent with respect to either the corporation or himself. In support of his claim, plaintiff primarily claims that Natural Gas Compression did not mail him a notice of the annual meeting so that he did not attend and did not vote his shares against the merger. However, even if plaintiff had received notice of the meeting and had voted all of his shares, it would have made no difference because 84 percent of the eligible shares voted for the merger and only 71 percent of the eligible votes were needed for the merger to pass.

[3] Plaintiff also maintains that the trial court erred in finding that he did not timely file his claim because the limitation period in MCL 450.1489(1)(f) applies only to claims for damages, it does not apply to claims for equitable relief requested under MCL 450.1489(a)-(e). We disagree.

Under *Estes, supra* at 272, 286, 649 N.W.2d 84, this Court held that the residual catch-all, six year limitation period in MCL 600.5813 applies to claims under MCL 450.1489. However, in 2001 PA 57, the Legislature added MCL 450.1489(1)(f) that provides a three-year limitation period from accrual and a two-year limitation period from discovery for claims requesting damages. But, as plaintiff argues, the amendment did not specifically address the limitation period for claims seeking equitable relief. Accordingly, the residual six-year limitation period in MCL 600.5813 presumably applies to plaintiff's claim insofar as he requests equitable relief instead of damages. But this does not assist plaintiff.

Plaintiff ostensibly requests equitable relief in his complaint, including the unwinding of the merger and the "uncanceling" of his shares. However, plaintiff actually requests damages because he seeks equitable relief only to compel Natural Gas Compression to purchase his shares at "fair value." Thus, the two-year limitation period under the discovery rule applies. As noted above, plaintiff acknowledged that he had a potential cause of action on October 29, 2002, when he informed Natural Gas Compression that he would retain an attorney. However, plaintiff did not file his complaint until two years and ten months later. Therefore, plaintiff's complaint was untimely, even assuming that plaintiff had standing under MCL 450.1489.

Affirmed.

End of Document

TAB B

2004 WL 1790175
Only the Westlaw citation is currently available.
United States District Court,
E.D. Pennsylvania.

Anthony H.N. SCHNELLING, as Trustee of the Bankruptcy Estate of Epic Resorts, LLC and Epic Master Funding Corporation, Plaintiffs,
v.
PRUDENTIAL SECURITIES, INC., et al. Defendants.

No. Civ.A.03–6021. | Aug. 9, 2004.

Attorneys and Law Firms

Bryan J. Wick, Jamil N. Alibhai, Dallas, TX, Malcolm S. Gould, Patrick J. Doran, Pelino & Lentz, P.C., Philadelphia, PA, for Plaintiffs.

Carl G. Roberts, Ballard, Spahr, Andrews & Ingersoll LLP, Philadelphia, PA, Nicole S. Gambrell, Richard T. Archibald, Robert R. Summerhays, Weil, Gotshal & Manges LLP, Dallas, TX, for Defendants.

MEMORANDUM AND ORDER

SCHILLER, J.

*1 Plaintiffs Anthony H.N. Schnelling, as trustee of the bankruptcy estate of Epic Resorts, LLC, and Epic Master Funding Corp. ("EMFC") bring this action against Defendants Prudential Securities Inc., Prudential Financial Inc., and Prudential Securities Credit Corp., LLC ("PSCC") alleging breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, tortious interference with contract, fraud and fraudulent inducement, and negligent misrepresentation.[1] Defendants have filed counterclaims against Epic Resorts and EMFC for breach of contract, fraud and fraudulent inducement, and negligent misrepresentation and against Epic Resorts for indemnification. Presently before this Court is Plaintiffs' motion to dismiss Defendants' tort counterclaims against EMFC on statute of limitations grounds.[2] For the reasons that follow, Plaintiffs' motion is granted.

I. BACKGROUND

It is unnecessary, for purposes of the instant motion, to fully explicate the factual background underlying Defendants' counterclaims. The following relevant facts are set out in a light most favorable to Defendants. Plaintiffs Epic Resorts, a nationwide developer and marketer of vacation resorts, and EMFC, its wholly-owned subsidiary, were involved in a lending relationship with PSCC. (Am. Compl. ¶ 6, 8; Answer ¶¶ 109–10.) Pursuant to the terms of the "Credit Agreement," PSCC provided a credit warehouse lending facility from which Plaintiffs could withdraw funds in exchange for Epic Resorts' time-share receivables. (Am.Compl.¶ 17.)

In November 2000, PSCC informed Plaintiffs that the credit facility would not be extended beyond its December 2000 maturity date. (Answer ¶ 111.) In response, Plaintiffs requested several extensions of credit while they located a new lender. (*Id.* ¶ 112.)PSCC agreed to advance interim funds in exchange for Plaintiffs' compliance with certain new conditions. (*Id.*) One of the conditions was that Plaintiffs would provide accurate financial information to PSCC. (*Id.* ¶ 113.)

Pursuant to a separate agreement with senior secured note-holders, Epic Resorts was required to hold certain funds in escrow for semi-annual interest payments. (*Id.* ¶ 114.)In both SEC filings and statements to PSCC, Plaintiffs represented that several million dollars were escrowed for such payments. (*Id.* ¶ 114.)In reliance upon these representations, PSCC advanced over $18 million in funds during the first half of 2001. (*Id.* ¶ 115 .)In June 2001, Epic Resorts failed to make the required interest payments to its note-holders. (*Id.* ¶ 116.)At that time, PSCC learned that Plaintiffs' prior statements regarding the escrow accounts were false. (*Id.*) As a result, the note-holders forced Epic Resorts into involuntary bankruptcy in July 2001.(*Id.*) In March 2004, PSCC sold its portfolio of receivables at a loss of $13 million. (*Id.* ¶ 117.)On June 22, 2004, Defendants filed the instant counterclaims.

II. STANDARD OF REVIEW

*2 In considering a motion to dismiss for failure to state a claim upon which relief may be granted, courts must accept as true all of the factual allegations pleaded in the complaint and draw all reasonable inferences in favor of the non-moving party. *Bd. of Trs. of Bricklayers & Allied Craftsmen Local 6 of N.J. Welfare Fund v. Wettlin Assocs., Inc.*, 237 F.3d 270, 272 (3d Cir.2001). However, a court "need not credit a complaint's bald assertions or legal conclusions when deciding a motion to dismiss."*Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir.1997) (internal quotation omitted). A motion to dismiss will only be granted if it is clear that relief cannot be granted to the plaintiff under any set of facts that could be proven consistent with the complaint's allegations. *See Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) (*citing Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). A court may dismiss a cause of action on statute of limitations grounds when it appears on the face of the complaint that the claim is time-barred. *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir.2002); *Oldroyd v. Assocs. Consumer Discount Co.*, 863 F.Supp. 237, 240 (E.D.Pa.1994).

III. DISCUSSION

The parties agree that claims of fraud, fraudulent inducement, and negligent misrepresentation are subject to a two-year statute of limitations in Pennsylvania and that the limitations period begins to run when the causes of action accrue. 42 PA. CONS.STAT. § 5524(7) (2004)."[A] cause of action accrues on the date the injury is sustained, or when 'a party has a legal right to institute suit and can maintain a successful action." ' *DiCicco v. Willow Grove Bank*, 308 F.Supp.2d 528, 534 (E.D.Pa.2004) (*citing ITG, Inc. v. Price Waterhouse*, 697 F.Supp. 867, 870–71 (E.D.Pa.1988)). For purposes of the instant motion, the sole dispute between the parties concerns when the tort causes of action accrued. Plaintiffs contend that the causes of action accrued in June 2001, when PSCC learned that the statements regarding the escrow accounts were false. Defendants claim that their causes of action did not accrue until March 2004, when the portfolio of receivables was sold at a loss of $13 million.

Defendants' position misidentifies the occurrence of the legal injury. A claim accrues when a plaintiff is damaged, not when the precise amount or extent of the damage is realized. *See F.P. Woll & Co. v. Fifth & Mitchell St. Corp.*, No. 02–4372, 1999 WL 79059, at *10, 1999 U.S. Dist. LEXIS 894, at *29 (E.D.Pa. Feb. 4, 1999) (cause of action accrued when plaintiff realized property had been contaminated, not when he later sold property); *Adamski v. Allstate Ins. Co.*, 738 A.2d 1033, 1042 (Pa.Super.Ct.1999) ("[O]ur Court has repeatedly held that, for purposes of the statute of limitations, a claim accrues when a plaintiff is harmed and not when the precise amount or extent of damages is determined."). The damage to PSCC occurred when it became aware that the escrow accounts were not created in June 2001. At that point, or at least when Epic Resorts entered bankruptcy in July 2001, PSCC should have known that Epic Resorts' and EMFC's allegedly tortious actions would negatively impact the value of its portfolio of receivables.[3]*See Barnes v. Amer. Tobacco Co.*, 161 F.3d 127, 136 (3d Cir.1998) ("A claim under Pennsylvania law accrues at the occurrence of the final significant event necessary to make the claim suable."(internal quotation omitted)). The fact that PSCC did not formally realize the $13 million loss until March 2004 does not delay the running of the limitations period. A contrary holding would "effectively enable similarly situated parties to forestall the running of the statute of limitations indefinitely."[4]*F.P. Woll & Co.*, 1999 WL 79059 at *10. Accordingly, Defendants' counterclaims, which were filed more than three years after the causes of actions accrued, are time-barred.

ORDER

*3 AND NOW, this 9th day of August, 2004, upon consideration of Plaintiffs Anthony H.N. Schnelling, as trustee of the bankruptcy estate of Epic Resorts, LLC, and Epic Master Funding Corp.'s ("EMFC") Motion to Dismiss, Defendants Prudential Securities Inc., Prudential Financial Inc., and Prudential Securities Credit Corp., LLC's response thereto, and for the foregoing reasons, it is hereby ORDERED that:

1. Plaintiffs' Motion to Dismiss (Document No. 35) is GRANTED. Counts II & III are DISMISSED as against Epic Master Funding Corp.

Footnotes

1 By Memorandum and Order of June 3, 2004, this Court granted Defendants' motion to dismiss Plaintiffs' claim against PSCC for breach of the implied covenant of good faith and fair dealing and denied Defendants' motion in all other respects.

2 Plaintiffs originally moved to dismiss Defendants counterclaims against Epic Resorts as well. On July 23, 2004, the parties stipulated to a stay of all counterclaims against Epic Resorts due to pending bankruptcy proceedings.

3 Despite Defendants' assertion, the Third Circuit's holding in *CGB Occupational Therapy, Inc. v. RHA Health Services, Inc.* does not compel a contrary result. 357 F.3d 375, 384 (3d Cir.2004). In *CGB,* the Third Circuit held that CGB's cause of action for tortious interference with a contract accrued when the contract was terminated, not when CGB became aware of defendant's allegedly interfering conduct. *Id.* at 384.The Court reasoned that CGB had not suffered "actual legal damage" necessary to make the claim suable until the termination because, until that time, the contract remained "in full force and effect." *Id.* In this case, Defendants suffered actual legal damage in the diminution in value of the time-share receivables due to Plaintiffs' allegedly tortious conduct long before the receivables were sold in March 2004.

4 Defendants also suggest that their allegation that the injury occurred in March 2004 must be accepted as true at this stage of the proceedings. When considering a motion to dismiss, the Court must accept as true all of the factual allegations pleaded, but not "bald assertions" or "legal conclusions." *Morse,* 132 F.3d at 906. Therefore, Defendants' allegation that the injury occurred in March 2004 need not be credited by this Court. *See DiCicco,* 308 F.Supp.2d. at 535.

End of Document

TAB C

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE COUNTY OF OAKLAND

SCHAFER AND WEINER, PLLC,
a Michigan professional limited
liability company, and SW 2001,
P.C. f/k/a Schafer and Weiner, PC,

Plaintiff/Counter-Defendant,

HON. ELIZABETH PEZZETTI
CASE NO.: 2008-320,768-CZ

v

ESTATE OF ARNOLD S. SCHAFER,
an estate of a decedent,

Defendant/Counter-Plaintiff,

And

ESTATE OF ARNOLD S. SCHAFER,

Counter-Plaintiff,

v

DANIEL WEINER AND MICHAEL BAUM,

Counter-Defendants.

/

OPINION & ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court held in the
Probate Court in Pontiac, Michigan on

July 16, 2009

PRESENT: HONORABLE ELIZABETH PEZZETTI
Probate Court Judge

This matter is before me on Defendant's Motion for Summary Disposition under MCR 2.116(C)(7) and (10). This motion is decided without oral argument under MCR 2.119(E)(3).

I. FACTS

Arnold Schafer was an attorney, founder and the majority shareholder of both: (i) Schafer and Weiner, PC; and (ii) Schafer and Weiner, PLLC. Each company operated as a law firm. Schafer and Weiner, PC ("the PC") was incorporated in 1983. (Defendant's Exhibit "J"). Schafer and Weiner, PLLC ("the PLLC") was formed in 2002. However, the PLLC has been operating without an Operating Agreement. (Complaint, para 1, 32).

On October 27, 2007, Mr. Schafer unexpectedly died before an agreement to purchase his shares in the PLLC could be finalized. On February 28, 2008, case number 08-315471-DE was commenced in the Probate Court. On December 26, 2008, Plaintiffs Schafer and Weiner, PLLC and SW 2001, PC f/k/a Schafer and Weiner, PC (collectively referred to as "Plaintiffs") commenced the present action alleging that Mr. Schafer received, *inter alia*, unauthorized compensation from 1999 through 2007, as well as unauthorized expense payments from 2002 through 2007. Plaintiffs' complaint contains the following counts:

(I) Declaratory Relief (regarding the validity of a purchase agreement for Schafer's interest in the law firm);
(II) Recoupment and/or Set Off; Promissory Estoppel, Breach of Contract and Constructive Trust;
(III) Recoupment and/or Set Off; Breach of MCL 450.4404(1) and MCL 450.1541(a) and Constructive Trust;
(IV) Recoupment and/or Set Off; Breach of Contract;
(V) Recoupment and/or Set Off; Unjust Enrichment;
(VI) Recoupment and/or Set Off; Conversion; and
(VII) Recoupment and/or Set Off; Fraudulent Misrepresentation and Silent Fraud.

On February 10, 2009, Defendant filed a counter/third party complaint for, *inter alia*, Breach of Contract and Dissolution of the PLLC.

II. THE PARTIES' POSITIONS

First, Defendant seeks dismissal of all claims brought by the PC on four separate grounds: (i) estoppel; (ii) waiver; (iii) statute of limitations; and (iv) statute of repose.

Next, Defendant seeks dismissal of the PLLC's claims that occurred before December 26, 2006, because the claims are barred under a two year statute of limitations. Similarly, Defendant seeks dismissal of the PLLC's claims that occurred before December 26, 2005, because the claims are barred under a three-year statute of repose, MCL 450.4404.

Defendant further argues that the PC's claims regarding excess compensation are barred because the shareholders of the PC signed resolutions that ratified, approved and confirmed the payments.

In response, Plaintiffs collectively assert that the limitation periods in MCL 450.4404 and 450.1541a only apply to statutory claims, or the deceased's breach of fiduciary duties. Plaintiffs argue that the shorter limitation periods do not apply to Plaintiffs' common law claims, such as breach of contract and unjust enrichment. Instead, Plaintiffs claim that a six year statute of limitations applies to Counts II, IV, V and their "constructive trust claims in Counts II through VII".

Plaintiffs next assert that their claims are not barred due to the discovery rule doctrine; that the deceased "fraudulently concealed his actions" and Plaintiffs did not discover the fraud until they reviewed the books and accounting records in 2007, after Schafer died.

Plaintiffs further claim that in 1988, Schafer executed a Redemption Agreement with the PC. Plaintiffs claim that the deceased violated the Redemption Agreement every year from 1999 through 2007 by taking "unauthorized" funds from the law firms. Plaintiffs assert that the 1988 Redemption Agreement is enforceable against the Estate.

III. APPLICABLE LAW & ANALYSIS

A. Standard of Review

A motion for summary disposition filed under MCR 2.116(C)(7) seeks dismissal of a claim due to a "release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action". MCR 2.116(C)(7). In reviewing a motion filed under MCR 2.116(C)(7), all of a plaintiff's well-pleaded allegations in the complaint are accepted as true, unless contradicted by documentary evidence submitted by the moving party. *Malden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

On the other hand, a motion under MCR 2.116(C)(10) tests the factual support for a party's position. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion filed under MCR 2.116(C)(10), I consider the pleadings, affidavits and all other evidence in the light most favorable to the non-moving party. MCR 2.116(G)(5); *Malden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). All inferences are to be drawn in favor of the non-movant. *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987).

The moving party has the initial burden of supporting his position with affidavits, depositions, admissions, or other documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of material fact exists. *Id.* Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue of material fact. *Smith v Globe Life Ins Co*, 460 Mich 446 (1999).

B. Statute of Limitations, Statutes of Repose and Tolling

Defendant argues that all of the PC's claims against the estate are time barred under MCL 450.1541a, which sets forth a two and three year statute of repose. Defendant explains that the PC's cause of action accrued, if at all, between 1999 and 2001; and that the complaint was not filed until seven years later. Defendant relies on *Baks v Maroun*, 227 Mich App 472; 576 NW2d 413

(1998) and *Detroit Gray Iron & Steel Foundries, Inc v Martin*, 362 Mich 205; 106 NW2d 793 (1961) in support of its position.

Defendant further states that the majority of the PLLC's claims are barred by a two-year statute of repose under MCL 450.4404(6), as Plaintiffs' cause of action accrued when the money was taken from the PLLC. [1] Defendant relies on *Continental Casualty v Huron Valley National Bank*, 85 Mich App 319, 3240325 (1978) for the rule that claims for wrongful taking of money accrue at the time the money is taken because that is when the harm occurs.

Plaintiffs claim that none of their claims are time barred because the deceased "fraudulently concealed his actions", and the tolling provision of the discovery rule doctrine is applicable. Plaintiffs assert that a six year statute of limitations applies to Counts II, IV, V and their "constructive trust claims in Counts II through VII". Plaintiffs further explain that some of their claims are separate and distinct (such as a breach of contract claim) from their claims arising as a result of Schafer's breach of fiduciary duties.

I. Statute of Repose and Plaintiffs' Claims

"A statute of repose limits the liability of a party by setting a fixed time after . . . which the party will not be held liable for . . . injury or damages . . .. Unlike a statute of limitations, a statute of repose may bar a claim before an injury or damage occurs." *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 513 n3; 573 NW2d 611 (1998).

MCL 450.4404(6) provides:

> An action against a manager for failure to perform the duties imposed by this act shall be commenced within 3 years after the cause of action has accrued or within 2 years after the cause of action is discovered or should reasonably have been discovered by the complainant, whichever occurs first.

Likewise, MCL 450.1541a(4) provides:

> an action against a director or officer for failure to perform the duties imposed by this section shall be commenced within 3 years

[1] Defendant's brief refers to the limitations periods set forth in MCL 450.1541a(4) and 450.4404(6) as both, a statute of limitations and a statute of repose. Although the two defenses are similar, they are technically different, as indicated herein.

> after the cause of action has accrued, or within 2 years after the time when the cause of action is discovered or should reasonably have been discovered, by the complainant, whichever occurs first.

Plaintiffs' arguments regarding discretionary remedies (such as money damages, equitable relief, and constructive trusts), the discovery rule doctrine and the 'catch-all' six year statute of limitations is reminiscent of the arguments made in a line of cases regarding the characterization of a plaintiff's claims and statutory interpretation of the applicable time periods for bringing claims. These cases include, but are not limited to, *Detroit Gray Iron & Steel Foundries, Inc v Martin*, 362 Mich 205; 106 NW2d 793 (1960); *Baks v Moroun*, 227 Mich App 472; 572 NW2d 413 (1998), rev'd in part by *Estes v Idea Engineering & Fabrication, Inc*, 250 Mich App 270; 649 NW2d 84 (2002) .

The *Baks* Court held that the plaintiffs' claims under MCL 450.1489 were subject to the three-year statute of repose in 450.1541a. The court also held that the fraudulent concealment statute was not applicable, and that a six-year limitation period for breach of a contractual duty[2] did not apply. In other words, the fraudulent concealment (tolling) exception does not apply to statutes of repose. This specific holding (that the fraudulent concealment tolling exception does not apply to statutes of repose) has not been rejected or overruled by the Court of Appeals or the Michigan Supreme Court.[3] See also *Hayes v General Motors Corp*, 94 F3d 644 (6th Cir 1996).

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[2] Like the plaintiffs in *Baks, supra*, the Plaintiffs in the present action are asserting a breach of contract claim.

[3] In *Baks, supra*, the Court of Appeals stated that the fraudulent concealment statute is not applicable if a claim brought against a corporate officer or director is based upon conduct that is governed by the period of repose contained in MCL 450.1541a(4).

In *Baks*, the Court observed that there were two different statutes that could redress an oppressed shareholders' claims, MCL 450.1541(a) and MCL 450.1489. Each statute had a different limitations period. The plaintiffs argued that their claims of "willfully unfair, fraudulent, illegal and oppressive" conduct against the defendants were a cause of action under MCL 450.1489, and therefore, subject to a six-year statute of limitations. The defendants claimed that plaintiffs' claims were subject to the statute of repose under MCL 450.1541a.

The *Baks* Court reasoned that the purpose of the two statutes was different. Nonetheless, the Court found that the limitations period of section 541a(4) is applicable to "any action for breach of fiduciary duty . . . if the action alleges conduct that violates the standard of conduct . . . found in §541a(1)".

However, the *Baks* Court also held that MCL 450.1489 did not create a separate and distinct cause of action from that of MCL 450.1541a, and that a six year statute of limitations did not apply to claims under 450.1489. As indicated below, the *Baks* decision was later reversed in part by a conflict panel in *Estes v Idea Engineering & Fabrication, Inc*, 250 Mich App 270; 649 NW2d 84 (2002).

In *Estes v Idea Engineering & Fabrication, Inc*, 250 Mich App 270; 649 NW2d 84 (2002), the Court held that MCL 450.1489 "creates a statutory cause of action along with flexible discretionary remedies to shareholders of closely held corporations" and that claims under MCL 450.1489 have a six year statute of limitations. The *Estes* Court specifically rejected the holding in *Baks v Maroun*, 227 Mich App 472; 576 NW2d 413 (1998), that MCL 450.1489 did not create a separate cause of action distinct from MCL 450.1451a.

The *Estes* conflict panel explained that claims brought under MCL 450.1489 are different than claims brought under 450.1451a, as the statutes redress different injuries. The two statutes "have different standards, different parties, different purposes and different relief provisions". The Court stated:

> Section 541a applies to all Michigan corporations; § 489 is available only to shareholders of Michigan corporations whose shares are not listed on national securities exchange and are not regularly traded in a market maintained by one or more members of a national or affiliated securities association. Section 489 provides a cause of action for illegal or willfully unfair and oppressive conduct. This is a different standard of relief than the reasonable person standard set forth in § 541a. Further, as pointed out in the *Baks* dissent, the plaintiff in the § 489 case is a shareholder suing directly whereas a plaintiff in a § 541a action is a corporation suing for breach of a duty to the corporation or a shareholder suing derivatively on behalf of the corporation. Also, the remedy for a breach of a § 541a cause of action is mandatory whereas the remedy for oppressive conduct under § 489 is discretionary. Additionally, the remedy under § 541a is for the benefit of the corporation and the harm done to it whereas certain of the remedies contained in § 489 are specifically for the benefit of the shareholder, and may not necessarily benefit and could impose obligations on the corporation.

Consequently, in order to resolve the statute of limitations, repose and tolling issues in the instant action, the Court must examine the claims asserted in the complaint. If Plaintiffs' claims arise under MCL 450.1451a, then the fraudulent concealment tolling statute does not apply. *See Baks, supra.*

As previously indicated, Plaintiffs' complaint contains seven counts. The complaint does not specifically identify which Plaintiff is bringing which counts (ie, the PLLC is asserting Count I for declaratory judgment). The individual shareholders of the Plaintiff law firms are not listed as Plaintiffs. A thorough review of the complaint also establishes the following:

i. the respective companies have brought suit against Schafer's Estate, Schafer being the majority shareholder (Complaint, pp1-2);
ii. Plaintiffs have invoked MCL 450.1541a (Complaint, pp 11, 12);
iii. Plaintiffs repeatedly allege that Schafer took unauthorized funds from the firms. (Complaint, pp 4, 6-9, 11-12, 14-15, 16-17, 19-20, 22-24);
iv. Plaintiffs claim that Schafer failed to "discharge his management duties "in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances . . ." . (Complaint, p11);
v. The PLLC claims that Schafer "was required to account to the PLLC and hold as trustee for the PLLC . . .". (Complaint, p12);
vi. The alleged breach of contract is "comprised of the taking of the Unauthorized Payments". (Complaint, p15);
vii. The alleged conversion is wholly based on the alleged unauthorized payments. (Complaint, pp19-20);
viii. Plaintiffs' fraud claim alleges that Schafer "was under a duty to disclose" the alleged unauthorized payments, and that he failed to disclose the same. (Complaint, p23, para 100 and 102);
ix. Counts III, IV, V, VI, and VII are brought in the alternative to Count II seeking recoupment and/or setoff for the alleged unauthorized payments; and
x. The remedies sought are for the benefit of the law firms.

Every one of these factors leads me to the conclusion that Plaintiffs' claims (with the exception of Count I, Declaratory Judgment) are claims under MCL 450.1451a and MCL 450.4404, no matter how Plaintiffs attempt to characterize their individual counts. Thus, I conclude that the claims set forth in Plaintiffs' complaint are grounded in Schafer's alleged conduct of acquiring and retaining unauthorized funds from the law firms under MCL 450.1451a and 450.4404. As such, Plaintiffs' claims (both the PC's and the PLLC's) are *all* subject to the statutes of repose set forth in MCL 450.1451a(4) and 450.4404(6).

Consequently, Plaintiff's argument regarding the 'catch all' six year statute of limitations, MCL 600.5807, fails.[4]

II. Tolling and the Fraudulent Concealment Statute

Next, I find that the tolling provisions of the discovery doctrine are not applicable to the facts alleged and asserted in this action. The fraudulent concealment tolling provision is designed to prevent actions which hinder a plaintiff from discovering the existence of a claim or the identity of the liable persons. *Stroud v Ward*, 169 Mich App 1, 7-8; 425 NW2d 490 (1988), lv den 432 Mich 852 (1989). Fraudulent concealment which will postpone the operation of a statute of limitations must be concealment of the fact that the plaintiff has a cause of action. Thus, if the plaintiff knows of the cause of action, there can be no concealment. *Stroud, supra*. Most importantly, a plaintiff will be held to know what he ought to know by the exercise of due diligence. *Eschenbacher v Hier*, 363 Mich 676, 681-682; 110 NW2d 731 (1961).

Paragraph 26 of Plaintiff's complaint alleges that "in the early 1990's" Schafer took substantial funds from the PC "without the consent or authorization of the other shareholders," and that the other shareholders discovered Schafer's conduct. Therefore, Plaintiffs had actual notice of Schafer's prior conduct, which is substantially similar to the wrongs Plaintiffs are currently seeking redress for.

Moreover, if Plaintiffs had exercised due diligence, they would have discovered the alleged unauthorized payments in a timely manner. A plaintiff who fails to exercise diligence in discovering his claim cannot allege concealment. *Doe v Roman Catholic Archbishop*, 264 Mich App 632, 653; 692 NW2d 398 (2004). Discovery demonstrates that both Weiner and Baum were shareholders and officers of the PC. (Defendant's Exhibits B3 - B7, Defendant's Exhibit H; Plaintiffs' Exhibit C, p2, para 7). Additionally, Weiner and Baum were, and still are, members of the PLLC. As such, Wiener and Baum had a statutory right to review and inspect the PLLC's books, records and tax returns under MCL 450.4503; as well as a statutory right to review and inspect the PC's books,

[4] Moreover, the PC's claims (such as breach of contract) would still be time barred under a six year statute of limitations.

records and tax returns under MCL 450.1487. Nonetheless, Baum and Weiner maintain that they "did not review the firm's financial records, and did not ask to have access to the firm's financial records, during Mr. Schafer's lifetime". (Plaintiffs' Exhibit C, Affidavit of Weiner, para 21; Plaintiff's Exhibit D, Affidavit of Baum, para 13).

Further, the evidence shows that:

(i) all amounts claimed by the PLLC (2002 – 2007) were recorded on the PLLC's general ledger and were also reported as income to Schafer on the PLLC's tax returns (Defendant's Exhibit D, Affidavit of Glogower, p2, para 4);

(ii) Plaintiffs admitted that the alleged unauthorized compensation taken by Schafer was recorded on the company's books and records, and in some cases, the company's tax returns, for the years 1999 through 2007 (Defendant's Exhibit C and Plaintiffs' Exhibit G, Answers to Requests to Admit).

(iii) the office manager never wrote a check to Schafer that was not recorded in one of the firms' checkbooks (Defendant's Exhibit G, DT of Peickert, p82);

(iv) likewise, Schafer never took any money out of the firm that the office manager did not have knowledge (Defendant's Exhibit G, DT of Peickert, p44);

(v) all payments at issue were known to the office manager and an outside accountant (Defendant's Exhibit G, DT of Peickert);

(vi) all information about all payments or checks at issue were recorded in the firms' books and records (Defendant's Exhibit G, DT of Peickert, pp 66, 106);

(vii) the office manager maintained the firms' general ledger, check books, tax returns and payroll information in her office (Defendant's Exhibit G, DT of Peickert, pp 109, 111, 127);

(viii) Michael Baum had knowledge that the office manager signed his name to checks written on the firms' accounts without his express permission (Defendant's Exhibit G, Affidavit of Peickert, pp 101, 107-110); and

(ix) Baum and Weiner never requested to see the cancelled checks, the tax returns, or the books and records that the office manager maintained (Defendant's Exhibit G, DT of Peickert, pp 22-23, 110, 111-112).

Given the evidence presented, it is clear that Plaintiffs failed to exercise due diligence. Therefore, under MCR 2.116(C)(10), Plaintiffs failed to meet their burden of proof establishing a genuine issue of material fact regarding concealment. Under *Doe, supra*, Plaintiffs cannot claim concealment due the lack of diligence. Additionally, statutes of limitation are designed, *inter alia*, to encourage the rapid recovery of damages and penalize plaintiffs who have not been assiduous in pursuing their claims. *Doe, at* 642. Given the amount of evidence in this action at this time, tolling the statute of limitations (and statutes of repose) would violate public policy. Consequently, I will not toll Plaintiffs' cause of action under the discovery rule doctrine.

C. Estoppel, Waiver and the PC's Claims

Defendant next asserts that "all of the amounts claimed by the PC and the PLLC to have been improperly paid to Arnold Schafer were timely recorded on the books, records and tax returns of the PC and the PLLC for each year in question from 1999 to 2007". (Defendant's Brief in Support of Summary Disposition, p7). Thus, the PC and the PLLC had timely and actual knowledge of all amounts paid to Arnold Schafer. Defendant relies on *Upjohn v New Hampshire Ins Co*, 438 Mich 197, 400-01 (1991) and *Gordon Sel-Way v Spence*, 177 Mich App 116, 124 (1989) for the proposition that information contained in the books, records and tax returns is imputed to the corporation.

Defendant claims that the PC "either waived or is estopped" from asserting its claims, because the PC ratified Schafer's compensation every year. Defendant relies on the deposition transcript of Michael Baum, a former shareholder, in support of this argument.

A waiver is the voluntary and intentional abandonment of a known right. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374 (2003).

Equitable estoppel is a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact. The elements of equitable estoppel are: (1) intentional or negligent inducement of another party to believe certain facts through representations, admissions, or silence; (2) justifiable reliance on those facts; and (3) prejudice to the other party if those facts are denied. *Holland v Manish Enterprises*, 174 Mich App 509, 514; 436 NW2d 398 (1989).

Estoppel is properly argued by Defendant based on the facts presented. The PC's Meeting Minutes are signed by Schafer, Baum and Weiner, and provide: "a very detailed discussion as to the compensation of the Officers and other employees" was performed . . . RESOLVED, all compensation paid or accrued to the Officers and other employees of the Corporation is deemed to be reasonable and is hereby ratified, approved and confirmed in all respects . . . ". (Defendant's Exhibit B4- B7).

Nonetheless, Baum and Weiner have filed self-serving affidavits indicating that they would not have signed the resolutions if Schafer had disclosed his excess salary or cashing checks written to him. (Plaintiffs' Exhibits C and D). As previously mentioned, Paragraph 26 of the Complaint alleges that "in the early 1990's" Schafer took substantial funds from the PC "without the consent or authorization of the other shareholders," and that the other shareholders discovered Schafer's conduct.

Considering the Complaint and the evidence in a light most favorable to the Plaintiffs, I find that Plaintiffs are estopped from denying the fact that they previously "ratified, approved and confirmed in all respects" Schafer's compensation from the PC. Thus, estoppel provides an additional basis to dismiss the PC's claims under MCR 2.116(C)(10).

D. The 1998 Redemption Agreement

The remaining issue[5] is whether the PLLC can enforce the 1998 Redemption Agreement against the Estate. In 1998, Schafer and the PC executed a Redemption Agreement. The PLLC is not a party to the Agreement.

Plaintiffs attempt to characterize Counts II and IV of their complaint as "breaches of express contracts, including [the] Redemption Agreement", and take the position that "the PLLC and the Estate are both successors to the 1998

[5] The issue regarding recoupment was not specifically addressed in the moving party's initial brief. However, based on Plaintiffs' responses, Recoupment versus Set-off was addressed in the July 13, 2009 brief. As Defendant correctly states, Recoupment is an equitable defense, and not a claim asserted by a plaintiff: "the defense of recoupment refers to a defendant's right, in the same action, to cut down the plaintiff's demand, either because the plaintiff has not complied with some cross obligation of the contract on which he or she sues or because the plaintiff has violated some legal duty in the making or performance of that contract". *Mudge v Macomb County*, 458 Mich 87; 580 NW2d 845 (1998). Thus, recoupment is not available to the PLLC as a claim. Further, the Michigan Probate Code precludes the application of any setoff or recoupment based on stale claims, as MCL 700.3802(1) precludes payment of any claim that would otherwise have been time barred at the time of decedent's death.

Redemption Agreement" (Plaintiffs' Response Brief, p 4, Plaintiffs' Sur-Reply Brief, p2). Plaintiffs therefore conclude that the PLLC can enforce the Redemption Agreement against the estate because the PLLC is the successor to the PC.

However, Plaintiffs have failed to present applicable binding legal authority in support of this theory. A party may not leave it to the Court to search for authority to sustain or reject its position. *Staff v Johnson*, 242 Mich App 521, 529; 619 NW2d 57 (2000); *See Badiee v Brighton Area Schools*, 265 Mich App 343, 357, 373, 379; 695 NW2d 521 (2005).

Moreover, the only evidence submitted in support of this theory are conclusory self-serving affidavits asserting that the PLLC is the successor of the PC. Plaintiffs have failed to come forward with any documentation, such as contracts or corporate resolutions, clearly showing that the PLLC assumed all of the PC's obligations and liabilities. It is uncontested that the PLLC has been operating without a fully executed Operating Agreement. An Operating Agreement would have presumably indicated whether the PLLC intents to be bound to the PC's contractual obligations, such as the Redemption Agreement.

Nonetheless, the PC and the PLLC are separate and distinct legal entities. Indeed, the PC is now known as SW2001, PC. Both Schafer and Weiner, PC and SW 2001, PC are listed with the State of Michigan and have the same identification number, 137002. (Defendant's Exhibits "J" and "K"). Additionally, the results from a corporate entity search demonstrate that the PC is in good standing with the State of Michigan. (Defendant's Exhibit "J"). Thus, the PC has not been dissolved, and does not appear to have ceased doing business.

Therefore, Plaintiffs have failed to come forward with their burden of proof demonstrating that the PLLC is the successor entity of the PC. Consequently, Plaintiffs' conclusory allegation that the PLLC may enforce the Redemption Agreement against the Estate is dismissed under MCR 2.116(C)(10).

IV. CONCLUSION

For the reasons stated herein, as well as the reasons stated by Defendant, Defendant's motion for summary disposition is GRANTED under

MCR 2.116(C)(7) and (10). All of the PC's claims are barred. The PC's claims are subject to the three year statute of repose set forth in MCL 450.1541a(4), and tolling this time period (due to fraudulent concealment) is not applicable. Likewise, the PLLC's claims are subject to the three year statute of repose in MCL 450.4404(6). The limitation period for the PLLC's claims are not tolled. Therefore, all of the PLLC's claims that arose before December 26, 2005 are barred. [6] Estoppel provides an additional basis to preclude the PC's claims against the Estate. Finally, Plaintiffs' claim that the PLLC may enforce the Redemption Agreement is dismissed under MCR 2.116(C)(10).

However, this is not a final disposition of this action as the following remain: (1) the PLLC's claim for Declaratory Judgment regarding the valuation of Schafer's interest, which is part of Count I of Plaintiffs' complaint; and (ii) Defendant's counter and third party claims.

IT IS SO ORDERED.

Date:

JUL 16 2009

Elizabeth Pezzetti
HON. ELIZABETH PEZZETTI
CHIEF PROBATE JUDGE

A TRUE COPY
RUTH JOHNSON
Oakland County Clerk - Register of Deeds
By: [signature]
Deputy

PROOF OF SERVICE
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 7/16/09 by: [signature]
(X) U.S. Mail ( ) Fax
( ) Hand Delivery ( ) Fed Express

[6] I further note that all of the PC's claims are barred, regardless of whether the three year statute of repose or a six year statute of limitation is applicable.

TAB D

553 Fed.Appx. 495
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28.
(Find CTA6 Rule 28)
United States Court of Appeals,
Sixth Circuit.

Ashley TECHNER,
Plaintiff–Appellant/Cross–Appellee,
v.
Helen GREENBERG,
Defendant–Appellee/Cross–Appellant.

Nos. 12–2283, 12–2284. | Jan. 15, 2014.

Synopsis

Background: Member brought state court action against manager of limited liability company, seeking to recover unpaid proceeds due and owing to member's trust and denominating her claims as ones for breach of contract, breach of fiduciary duty, equitable estoppel, and minority member oppression. Trustee removed the action. Following a bench trial, the United States District Court for the Eastern District of Michigan rule that manager breached company's operating agreement and her fiduciary duties, and entered judgment in favor of member in the amount of $59,391.28. Parties cross-appealed.

Holdings: The Court of Appeals, Martha Craig Daughtrey, Circuit Judge, held that:

[1] sections of the Michigan Business Corporation Act governing actions against managers of limited liability companies for failure to perform duties imposed by the Act and governing awards of damages in actions for improper conduct of managers were statutes of limitations, not statutes of repose;

[2] member's breach of fiduciary duty claim accrued when the harm was suffered by member from failure to receive proper distributions;

[3] member was not entitled to equitable tolling of limitations period for fraudulent concealment as to her breach of contract claim; and

[4] member was entitled to equitable tolling of limitations period for fraudulent concealment as to her breach of fiduciary claim.

Affirmed in part; reversed in part; and remanded.

West Headnotes (5)

[1] **Corporations and Business Organizations**
Time to sue; limitations and laches

Member's allegations that manager of limited liability company breached that entity's operating agreement and failed to perform required duties by failing to allocate distributions of the profits of the company in direct proportion to the number of non-voting "units" each member owned constituted separate claims for breach of contract and breach of fiduciary duty under Michigan law, for purposes of applying varying limitations periods on the claims for monetary recoveries associated with breaches of the respective duties; although member's contract and tort claims both complained of the non-proportional distributions by the limited liability company, only the breach of fiduciary duty claim sought to impose liability upon manager for "systematically taking a hands-off and disinterested role with the company." M.C.L.A. §§ 450.4404(6), 450.4515(1)(e), 600.5807(8).

Cases that cite this headnote

[2] **Limitation of Actions**
Operation as to rights or remedies in general

Statutory sections of the Michigan Business Corporation Act governing actions against managers of limited liability companies for failure to perform the duties imposed by the Act and governing awards of damages to the company or member in actions by members for improper conduct of managers were statutes of limitations, not statutes of repose. M.C.L.A. §§ 450.4404(6), 450.4515(1)(e).

Cases that cite this headnote

[3] **Limitation of Actions**
⇐Fraud as Ground for Relief

Under Michigan law, member's breach of fiduciary duty claim against manager of limited liability company, alleging that manager failed to allocate distributions of the profits of the company in direct proportion to the number of non-voting "units" each member owned, accrued when the harm was suffered by member from failure to receive proper distributions. M.C.L.A. §§ 450.4404(6), 450.4515(1)(e).

Cases that cite this headnote

[4] **Limitation of Actions**
⇐What constitutes concealment

Under Michigan law, member was not entitled to equitable tolling of limitations period for fraudulent concealment as to her breach of contract claim against manager of limited liability company, alleging manager breached that entity's operating agreement by failing to allocate distributions of the profits of the company in direct proportion to the number of non-voting "units" each member owned, where member was unable to establish that manager took any affirmative act to conceal member's cause of action from her. M.C.L.A. §§ 600.5807(8), 600.5855.

Cases that cite this headnote

[5] **Limitation of Actions**
⇐What constitutes concealment

Under Michigan law, member was entitled to equitable tolling of limitations period for fraudulent concealment as to her breach of fiduciary claim against manager of limited liability company, alleging manager failed to perform required duties under entity's operating agreement by failing to allocate distributions of the profits of the company in direct proportion to the number of non-voting "units" each member owned, where manager was required to disclose to member that proper distributions were not being made on behalf of the entity to the member's trust, that affirmative duty existed regardless of the age of or the level of involvement by manager, and as long as manager remained a manager of the entity, she was responsible for disclosing to the company's members the distributions made from the company's coffers. M.C.L.A. §§ 450.4404(6), 450.4515(1)(e), 600.5855.

Cases that cite this headnote

***496** On Appeal from the United States District Court for the Eastern District of Michigan.

Attorneys and Law Firms

Paul P. Asker, Asker Perlmuter, Farmington Hills, MI, for Plaintiff–Appellant/Cross–Appellee.

William H. Horton, Giarmarco, Mullins & Horton, Troy, MI, for Defendant–Appellee/Cross–Appellant.

Before: DAUGHTREY, GIBBONS, and DONALD, Circuit Judges.

Opinion

MARTHA CRAIG DAUGHTREY, Circuit Judge.

Intra-family financial disputes oftentimes seem to end with neither party to the disagreement satisfied with the result reached. So, too, in this litigation, in which both plaintiff Ashley Techner and defendant Helen Greenberg, Techner's grandmother, appeal rulings by the district court on Techner's breach-of-contract and breach-of-fiduciary-duty claims against Greenberg. Techner complains that the district court refused to apply equitable-tolling principles to her claims that would allow her a greater monetary recovery. Although Greenberg agrees with the district court's decision that fraudulent-concealment principles should not have been applied to resurrect claims by Techner that fell outside the applicable statute-of-limitations periods, she submits that the district court nevertheless erred in treating the plaintiff's breach-of-contract allegation as a claim separate from her breach- *497 of-fiduciary-duty cause of action. Because the district court erred in ruling that Techner's breach-of-fiduciary-duty claim could not be extended in the face of Greenberg's fraudulent concealment of the existence of the claim, we reverse a portion of the district court's judgment and remand the matter for a recalculation of damages.

FACTUAL AND PROCEDURAL BACKGROUND

Following a bench trial in district court, the district judge summarized the relevant testimony and documentary evidence in this matter in the following findings of fact:

> 1. Ashley [Greenberg] is Barry [Greenberg]'s daughter. Barry is the son of Nathan and Helen Greenberg.
>
> 2. On December 22, 1998, Barry formed the Ashley Greenberg Trust. Barry initially was named Trustee. Ashley was appointed Trustee in July 2011.
>
> 3. Prior to May 4, 1999, Helen, as Trustee of the Helen Greenberg Trust, and Barry formed Greenberg Properties Limited Partnership. On May 4, 1999, Helen and Barry executed an Operating Agreement which converted the partnership to a limited liability company pursuant to the Michigan Limited Liability Company Act.
>
> 4. The Operating Agreement identifies Helen and Barry as Greenberg Properties' initial managers. With respect to management of the company, Paragraph 4.1 provides in part:
>
>> The management of the Company shall in all respects be the full and complete responsibility of the Manager.... If more that one Manager has been elected, the group shall act by majority vote....
>>
>> The Managers shall devote to the management of the Company as much time as is reasonably necessary for the efficient operation of the Company.
>
> Paragraph 4.2 of the Operating Agreement sets forth limitations on the managers' authority:
>
>> Notwithstanding anything to the contrary contained in this Agreement, the manager shall not, without the unanimous consent of all of the Members:
>>
>> (a) take any action in contravention of this Agreement;
>>
>> (b) take any action that would make it impossible to carry out the purposes of the Company; or
>>
>> (c) confess a judgment against the Company.
>
> 5. On May [4], 1999, Helen, as Trustee of the Helen Greenberg Trust, assigned the trust's Class B Non–Voting Units in Greenberg Properties as follows:

*498

Barry S. Greenberg: 475 Class B Non-Voting Units

Rachel N. Greenberg: 163.33 Class B Non-Voting Units [Ashley's sister]

Ashley L. Greenberg Agreement of Trust-1998 163.33 Class B Non-Voting Units

Steven Granitz: [Ashley's first cousin] 163.33 Class B Non-Voting Units

The Operating Agreement states that profits and losses of Greenberg Properties "shall be allocated to the Members in direct proportion to the number of Units owned by each of them." Paragraph 3.2 further provides that "[d]istributions shall be made ... subject to the fiduciary requirements of the [Michigan Limited Liability Company] Act and Michigan law generally." Pursuant to these provisions, the Ashley Greenberg Trust is entitled to 16.33% of every distribution authorized by the managers of Greenberg Properties.

6. Barry made the decision when to issue distributions from Greenberg Properties, to which members the distributions would be made, and the amount of the distributions. Initially, distributions were made in direct proportion to the number of Units owned by each member (i.e., in accordance with the Operating Agreement). Beginning around February 2003, however, Barry started to make distributions randomly, based on when a member asked him for money and the amount of money the member needed at the time.

7. Helen was neither consulted about nor aware of the basis for any distributions from Greenberg Properties. Helen did not do anything to manage Greenberg Properties. She did not discuss the management or affairs of Greenberg Properties with anyone, nor supervise Barry's actions in any manner. Helen did not create, receive, review, or request any information regarding distributions from Greenberg Properties. She "assumed" Barry was making proper distributions.

8. At some point in time, Ashley formed the belief that there might be a trust in her grandfather's name of which she was a beneficiary. After her attempts to obtain information from her father concerning her interest in the trust proved unsuccessful, Ashley had a lawyer contact her father. Barry referred Ashley's lawyer, Ian Pesses, to Robert Schwartz at Raymond & Prokop, P.C. in Southfield, Michigan. On September 7, 2005, Attorney Pesses sent Attorney Schwartz a letter requesting certain information related to "the Trust of which [Ashley] is a beneficiary." Ashley testified that she and Attorney Pesses were seeking information concerning her grandfather's trust, as this was the only trust of which she was aware at that time.

9. In 2008, Ashley filed a petition in the Probate Court for Oakland County, Michigan, in which she sought an accounting of the Nathan Greenberg Trust and alleged that the trustees of the Nathan *499 Greenberg Trust had breached their fiduciary duty to account for the trust funds ("Nathan Greenberg Trust litigation"). *See In re Nathan Greenberg Trust,* No. 292511, 2010 WL 4137461, at *1 (Mich.Ct.App. Oct. 21, 2010) (unpublished opinion). Early in the case, the respondents filed a motion for summary disposition which the probate court granted on March 31, 2009, after finding that there were no remaining assets of the trust to be distributed to the beneficiaries. The court interpreted the Nathan Greenberg Trust Agreement as providing for the distribution of Nathan Greenberg's estate into two separate shares: a family portion and a marital portion. The probate court further interpreted the trust agreement as requiring the distribution of specific assets of the family portion first to Barry and determined that, once the distribution to Barry had been made, there were no further assets to be distributed to the remaining beneficiaries of the family portion. The Michigan Court of Appeals affirmed the probate court's order.

10. At the end of 2005 or beginning of 2006, during the Nathan Greenberg Trust litigation, Ashley requested and received "trust" documents. These documents included the Ashley Greenberg Trust Agreement. This agreement informed Ashley for the first time that there was a trust in her name. The Ashley Greenberg Trust Agreement reflects that the trust's assets were $10.00. On May 22, 2009, Ashley sued Barry in the Circuit Court for Oakland County, Michigan, concerning his administration of the Ashley Greenberg Trust and to determine whether the trust had any further assets ("Ashley Greenberg Trust litigation").

11. During the Ashley Greenberg Trust litigation, Ashley received financial documentation reflecting monies the trust received and expenses paid from the trust's assets. This documentation reflected distributions to the Ashley Greenberg Trust from Greenberg Properties. Ashley testified that this was the first time she became aware of Greenberg Properties. Although distributions from Greenberg Properties were deposited in the bank account for the Ashley Greenberg Trust, Ashley testified that she never saw the bank statements for the trust which were sent to Barry, who was then the trustee. According to Ashley, she had no access to the Ashley Greenberg Trust bank account and in fact did not even know it existed. Barry endorsed the checks made payable to the trust. Payments made by Barry on Ashley's behalf from the trust account were made directly by him. When Barry sent funds to Ashley directly, he wrote a check to Ashley from the Ashley

Greenberg Trust bank account or Ashley's personal bank account, and then sent the funds to Ashley from those accounts.

12. On December 30, 2009 and January 12, 2010, in the Ashley Greenberg Trust litigation and after discovering the payments to the trust from Greenberg Properties, Ashley served the accountant for Greenberg Properties, Ed Rosenbaum, with subpoenas requesting various documents for the limited liability corporation. On January 18, 2010, Rosenbaum responded to the request and delivered to Ashley's attorney, *inter alia:* (1) all tax returns for Greenberg Services, LLC for 1998 and 1999; (2) all tax returns for Greenberg Properties LP or Greenberg Properties LLC for the period 1998–2008; (3) broker statements for Greenberg Properties LLC for 2009; and (4) operating agreements for Greenberg Services, LLC, Greenberg Properties, LP, and Greenberg Properties, LLC.

***500** 13. Ashley discovered the Ashley Greenberg Trust's interest in Greenberg Properties as a result of her review of these documents. The documents also alerted Ashley that any distributions from Greenberg Properties to its members were required to be in direct proportion to the number of Units they owned and that Barry, as the corporation's manager, had not made distributions proportionately.

14. At the end of the Ashley Greenberg Trust litigation, an arbitrator found $140,176.00 in distributions that should have been paid from Greenberg Properties to the trust, but were not. The arbitrator awarded the Ashley Greenberg Trust those funds from Barry. That amount, as well as other damages the arbitrator awarded Ashley, were converted to an April 24, 2011 Judgment against Barry totaling $611,237.81.

15. Despite her efforts to collect on the Judgment against Barry, Ashley has recovered only $12,000 of the total award.

16. After the Ashley Greenberg Trust litigation concluded, Ashley asked Barry to step down as the trustee of her trust. He refused. Ashley therefore had to file a separate lawsuit in Michigan Probate Court to remove Barry as the trustee and have a new trustee appointed. The probate judge ultimately removed Barry and appointed Ashley as the trustee of the Ashley Greenberg Trust in July 2011.

17. The distributions due to the Ashley Greenberg Trust from Greenberg Properties during the period from May 1, 2005 through June 1, 2009, have a current value of $59,391.28.

Ashley Greenberg Techner eventually filed suit in Michigan state court against her grandmother, seeking to recover the unpaid proceeds due and owing to the Ashley Greenberg Trust and denominating her claims as ones for breach of contract, breach of fiduciary duty, equitable estoppel, and minority member oppression. Helen Greenberg removed the matter to federal court on diversity-of-citizenship grounds. The district court then conducted a bench trial in the matter, after which the district judge ruled that the defendant did indeed breach both the express terms of the operating agreement of Greenberg Properties, LLC, and her fiduciary duties under the Michigan Limited Liability Company Act, Mich. Comp. Laws Ann. §§ 450.4101–450.5200. As a remedy, the district court ruled that the plaintiff was entitled to damages incurred in the six years immediately preceding the filing of Techner's lawsuit. The district court thus entered judgment in favor of the plaintiff in the amount of $59,391.28.

Believing that she should be entitled to recovery of additional funds not distributed to the Ashley Greenberg Trust over the years, Techner filed this appeal and asserted that Helen Greenberg fraudulently concealed the improper distributions and that Techner thus should be allowed to recover damages incurred prior to that six-year limitations period. Helen Greenberg cross-appealed, maintaining that the applicable statute of limitations that the district court should have imposed was not the six-year breach-of-contract limitations period but the shorter, three-year period provided for in Mich. Comp. Laws Ann. § 450.4404(6) relating to actions "against a manager [of a limited liability company] for failure to perform the duties imposed by [the] act." We have jurisdiction over these cross appeals pursuant to the provisions of 28 U.S.C. § 1291 and thus proceed to resolve the issues presented.

DISCUSSION

Standard of Review

Ashley Greenberg Techner's appeal and Helen Greenberg's cross-appeal both involve ***501** only questions of law. We thus review the decisions made by the district court *de novo. See, e.g., Harrison v. Michigan,* 722 F.3d 768, 770 (6th Cir.2013).

Determination of Limitations Period

In Count I of her complaint, Techner alleged that her grandmother, as a manager of Greenberg Properties, LLC, breached that entity's operating agreement by failing to allocate distributions of the profits of the company in direct proportion to the number of non-voting "units" each member owned. Such a breach-of-contract claim must be brought within six years of the improper actions. *See* Mich. Comp. Laws Ann. § 600.5807(8).

In Count II, Techner claimed that Helen Greenberg breached her fiduciary duties as a manager of Greenberg Properties, LLC, by, among other things, failing to comply with the requirements of the operating agreement that directed the managers to make proportional distributions of the company's profits and losses. Pursuant to the relevant provisions of Michigan's Limited Liability Company Act, an action against a manager of a limited liability company for failure to perform required duties, or an action for an award of damages to a member of a limited liability company, must be commenced within three years "after the cause of action has accrued" or within two years after the cause of action is discovered or reasonably should have been discovered, "whichever occurs first." Mich. Comp. Laws Ann. §§ 450.4404(6), 450.4515(1)(e).

The difference in the statutory periods during which causes of action for a breach of contract and for a breach of fiduciary duty imposed by the Limited Liability Company Act may be brought has engendered a preliminary dispute between the litigants. Techner argues that she properly has alleged both a contract claim (breach of contract) with a six-year period in which to initiate litigation and a tort claim (breach of fiduciary duty) that allows her three years "after the cause of action has accrued" to file a lawsuit. Greenberg counters by arguing that any alleged contractual breaches are, in actuality, breaches of the Greenberg Properties, LLC, operating agreement, a document that exists only to effectuate the provisions of the Michigan Limited Liability Company Act. Consequently, Greenberg insists, such "contractual" breaches must be treated as breaches of the defendant's fiduciary duties, subject to the three-year/two-year limit on filing suit contained in Mich. Comp. Laws Ann. § 450.4404(6) and Mich. Comp. Laws Ann. § 450.4515(1)(e). As argued by Greenberg:

> Here, "the exact nature of the claim" for which Plaintiff seeks relief in her breach of contract claim is the same as that imposed on Defendant by the Limited Liability Act. Without the Act, the operating agreement does not exist. Her claim is that Defendant breached duties owed to Plaintiff with respect to distributions made from Greenberg Properties—rights created and existing only because of and through the Act.
>
> The statutory scheme within which limited liability companies operate is comprehensive and governs the entire relationship between members and managers.

[1] Under Michigan law, "[i]t is well accepted that in ruling on a statute of limitations defense the court may look behind the technical label that plaintiff attaches to a cause of action to the substance of the claim asserted." *Local 1064, RWDSU AFL–CIO v. Ernst & Young,* 449 Mich. 322, 535 N.W.2d 187, 189 n. 10 (1995). Although recognizing that "[i]n some instances, Defendant's alleged breach of her contractual duties also constitutes a breach of her fiduciary duties," ***502** the district court here found no problem in allowing Techner to "assert breach of contract *and* breach of fiduciary duty" in her complaint. Indeed, although Techner's contract and tort claims both complain of the non-proportional distributions by the limited liability company's managers, only the breach-of-fiduciary-duty cause of action seeks to impose liability upon Greenberg for "systematically taking a hands-off and disinterested role with the company." Such a quintessential breach-of-fiduciary-duty claim justifies treating the contract and tort causes of action separately and thus applying varying time limits on the claims for monetary recoveries associated with breaches of the respective duties.

Further support for the district court's ruling, and for Techner's position on this issue, can be found in *S–S, LLC v. Merten Building Limited Partnership,* No. 292943, 2010 WL 4679524 (Mich.Ct.App. Nov. 18, 2010), a case in which the Michigan Court of Appeals explicitly held that an operating agreement is "*a contract* between the members of a limited liability company" and, therefore, is to be "construed according to principles of *contract* interpretation." *Id.* at *2 (emphasis added). In *S–S, LLC,* moreover, the plaintiff, like Techner, alleged both a breach of an operating agreement and a breach of fiduciary duty. *Id.* at *1. The trial court granted summary judgment to the plaintiff on the contract claim and the Michigan Court of Appeals affirmed that determination, *id.* at *1, 2–5, 9, validating the plaintiff's two-pronged attack on the defendant's actions.[1] *See also 72–52 Inv. Grp., LLC v. Lodish,* No. 287315, 2009 WL 3491616, at *2, 3–5, (Mich.Ct.App. Oct. 29, 2009) (claim for breach of operating agreement and claim for violation of the Michigan Limited Liability Company Act considered separately by court). We thus affirm that portion of the district court's judgment that recognized the viability both of Techner's breach-of-contract claim and her claim for breach of fiduciary duty.

Timing of Breach–of–Fiduciary–Duty Claims

Ordinarily, Techner's breach-of-fiduciary-duty claims should have been filed within three years after the cause of action accrued or within two years after she discovered, or reasonably should have discovered, the existence of the cause of action, whichever occurred first. *See* Mich. Comp. Laws Ann. §§ 450.4404(6), 450.4515(1)(e). Both the defendant and the district court assert that the relevant language of sections 450.4404(6) and 450.4515(1)(e) indicates that those provisions constitute *statutes of repose* rather than *statutes of limitation.* If they are ***503** correct, Techner's breach-of-fiduciary-duty cause of action was extinguished well before the initiation of her lawsuit on May 16, 2011. In fact, according to Techner's own allegations in her complaint, Greenberg Properties, LLC, was formed in May1999, and proper distributions of the company's profits were made only "during [the first few] years of Greenberg Properties['] existence."[2] Thus, if the relevant statutory provisions are deemed to constitute statutes of repose, any claim for breach of Helen Greenberg's fiduciary duties could extend back only as far as May 16, 2008, three years prior to the filing of this lawsuit. Any improper distributions made between early 2003 and May 2008 thus effectively would be insulated from challenge, review, or recovery.

The district court's conclusion that the statutory provisions constituted statutes of repose relied in large measure upon the rationale contained in the decisions in *Baks v. Moroun,* 227 Mich.App. 472, 576 N.W.2d 413 (1998), *overruled on other grounds by Estes v. Idea Eng'g & Fabricating, Inc.,* 250 Mich.App. 270, 649 N.W.2d 84 (2002); and *Trident–Brambleton, LLC v. PPR No. 1, LLC,* No. 1:05cv1423, 2006 WL 1880986 (E.D.Va. July 5, 2006). In *Baks,* the Michigan Court of Appeals was called upon to examine Mich. Comp. Laws Ann. § 450.1541 a(4), a provision of Michigan's Business Corporations Act containing language that is, in all relevant aspects, identical to the language in Mich. Comp. Laws Ann. § 450.4404(6) at issue here. In fact, section 450.1541a(4) provides:

> An action against a director or officer for failure to perform the duties imposed by this section shall be commenced within 3 years after the cause of action has accrued, or within 2 years after the time when the cause of action is discovered or should reasonably have been discovered, by the complainant, whichever occurs first.

Despite recognizing that one of the purposes of the Michigan Business Corporation Act is to protect minority shareholders from oppression, *Baks,* 576 N.W.2d at 419, the Michigan Court of Appeals nevertheless concluded that the language of section 450.1541 a(4) bars any claims against corporate officers or directors "more than three years after the date of the occurrence, regardless of when the plaintiff learned of the breach of duty and despite the fact that corporate officers and directors may have fraudulently concealed the occurrence." *Id.* at 421.

Then, in *Trident–Brambleton,* the United States District Court for the Eastern District of Virginia took the next logical analytical step and held, in a diversity action applying Michigan law, that the linguistic similarities between the limitations provisions of the Michigan Business Corporation Act and the Michigan Limited Liability Company Act supported the conclusion that sections 450.4404(6) and 450.4515(1)(e) also should be considered statutes of repose, not merely statutes of limitation. In fact, the district court stated, "[I]t is reasonable to assume that by using identical language in the Limited Liability Company Act as already existed in the Business Corporation Act, the legislature ***504** intended to give managers of limited liability companies the same repose that it afforded managers and officers of corporations." *Trident–Brambleton,* 2006 WL 1880986, at *5.

Of course, the conclusion reached by a district judge in Virginia that the provisions of the Michigan Limited Liability Company Act constitute statutes of repose, while persuasive, is not binding on this court in this appeal. The decision in *Virginia M. Damon Trust v. Mackinaw Financial Corp.,* No. 2:03–CV–135, 2008 WL 53230 (W.D.Mich. Jan. 2, 2008), intimates as much. In that case, a district court within the Sixth Circuit was called upon to return to the language of section 450.1541 a(4) of the Michigan Business Corporation Act to determine whether that statutory provision constitutes a statute of repose. The district court in *Virginia M. Damon Trust* recognized that *Baks* had concluded "that the statute creates a three-year statute of repose that bars actions three years after the date of the event forming the basis of the action." *Id.,* at *5. Nevertheless, the district court expressed its disapproval of *Baks* and went on to explain as follows:

> This Court is not bound to follow the Michigan Court of Appeals. Rather, this Court is to try to determine what the Michigan Supreme Court would do when faced with the issue. This Court believes that the Michigan Supreme Court would give effect to the unambiguous language of the statute and hold that the first provision of § 1541 a is a statute of limitations whose time period does not begin to run until Plaintiff's claims have accrued. A statute of repose

prevents a cause of action from ever accruing when the injury is sustained after the designated statutory period has elapsed. A statute of limitations, however, prescribes the time limits in which a party may bring an action that has already accrued. In light of this definition—and the plain language of § 1541a—the statute does not create a period of repose, but rather two alternative statutes of limitations. The first provision of the statute states that "an action ... shall be commenced within 3 years after the cause of action has accrued...." Unlike statutes of repose, § 1541a does not prevent the cause of action from accruing a certain time period after the event; rather, the statute provides a time limit that begins to run *once the claim accrues*. In light of the statute's unambiguous language, the fact that *Baks* has been overruled on other grounds, and the Michigan Supreme Court's unequivocal distinction between statutes of repose and statutes of limitations, this Court believes that § 1541a does not contain a statute of repose barring claims more than three years after the acts or omissions forming the basis of the claim. Instead, the three-year provision of § 1541a is a statute of limitations whose period begins to run once Plaintiff's claims have accrued.

Id. at *6 (citations and internal quotation marks omitted).

[2] Given the language of sections 450.4404(6) and 450.4515(1)(e) that specifically references commencement of actions "within 3 years after the cause of action *has accrued*," the rationale of the district court in *Virginia M. Damon Trust* makes more logical and linguistic sense than do the contrary decisions in *Baks* and *Trident–Brambleton*.[3] We thus conclude that ***505** the statutory sections at issue in this appeal are statutes of limitations, not statutes of repose, and that Techner should have been allowed three years from the date of the accrual of her breach-of-fiduciary-duty cause of action to initiate her lawsuit.

Of course, such a conclusion then raises the question of when a cause of action "accrues" for purposes of the Limited Liability Company Act's statutes of limitations. In *Prentis Family Foundation v. Barbara Ann Karmanos Cancer Institute*, 266 Mich.App. 39, 698 N.W.2d 900 (2005), the Michigan Court of Appeals held that "[a] claim of breach of fiduciary duty or breach of trust accrues when the beneficiary knew or should have known of the breach." *Id.* at 908 (quoting *Bay Mills Indian Cmty. v. Michigan*, 244 Mich.App. 739, 626 N.W.2d 169, 176 (2001)). Such a conclusion, however, conflicts with other court decisions and would produce an anomalous result in this case that would render much of the language of Mich. Comp. Laws Ann. §§ 450.4404(6) and 450.4515(1)(e) superfluous.

Section 600.5827 of the Michigan Compiled Laws Annotated provides that, except in certain situations not relevant here, "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." Nevertheless, the Michigan Supreme Court has stated that the phrase "time of the wrong" contained in the statute "specified the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which the defendant breached his duty." *Moll v. Abbott Lab.*, 444 Mich. 1, 506 N.W.2d 816, 822 (1993). Thus, Michigan's highest court has explained that, in general, claims accrue in Michigan not when a defendant perpetrates a wrong, not when a plaintiff learns or should have learned of the harm done, but rather only when the plaintiff actually suffered damages as a result of the defendant's actions, even if the plaintiff was not yet aware of the harm. As the district court in *Virginia M. Damon Trust* recognized:

> This is consistent with the generally accepted definition of accrue. Black's Law Dictionary, 19 (8th ed.2004); *Cooey v. Strickland*, 479 F.3d 412, 419 (6th Cir.2007) ("Under the traditional rule of accrual ... the tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages. The cause of action accrues even though the full extent of the injury is not then known or predictable.").

Virginia M. Damon Trust, 2008 WL 53230, at *6.

[3] In this case, under the statutory interpretation announced in *Moll*, the harm suffered by Ashley Techner (the failure to receive proper distributions to the Ashley Greenberg Trust) occurred at the same time that the defendant's wrong (the failure to ensure proper distributions) was perpetrated. Techner's breach-of-fiduciary-duty claim against Helen Greenberg thus accrued in January 2003, and Techner ordinarily would have been required to file her claim against the defendant no later than 2006, or, alternatively, within two years of learning of the breach if that two-year period would have concluded prior to 2006.

Applying such an interpretation to sections 450.4404(6) and 450.4515(1)(e) also makes logical sense. Adoption of the know-or-should-have-known position espoused by Techner and by the Michigan Court of Appeals in *Prentis Family Foundation* ***506** effectively writes out of the statutes the provisions providing for commencement of actions within three years of their accrual. If, as argued by the plaintiff in this case, the cause of action for breach of fiduciary duty did not accrue until she discovered, or reasonably should have discovered, she had suffered damages, the two-year provision of those statutes always would be relevant, and the earlier clause in the statutes providing for commencement of actions within three years of accrual would never apply. We should not interpret statutes in such a manner as to render provisions of the enactments superfluous. *See, e.g., Gross v. Gen. Motors Corp.*, 448 Mich. 147, 528 N.W.2d 707, 713 (1995).

Equitable Tolling of Limitations Period for Fraudulent Concealment

Pursuant to Mich. Comp. Laws Ann. § 600.5855:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

Techner thus claims that the time during which she was allowed to challenge the inaction or misdeeds of the defendant should be extended because of Helen Greenberg's fraudulent concealment of the failure of Greenberg Properties, LLC, to make proper distributions to the Ashley Greenberg Trust. She contends that the defendant's improper concealment of the existence of a claim for breach of fiduciary duty made it impossible for her to become aware of the legal remedies available to her. Consequently, Techner submits that she could file her complaint in this matter at any time within two years from the January 18, 2010, date on which she first became aware of the defendant's failure to ensure proper distribution of company profits to the Ashley Greenberg Trust.

[4] The district court refused to toll the applicable period for filing suit both for a breach of contract and for a breach of fiduciary duty. First, addressing the plaintiff's breach-of-contract claim, the district court stated that for fraudulent concealment to postpone the running of a limitations period, the fraud "must be a concealment produced by affirmative acts or misrepresentations." *Draws v. Levin*, 332 Mich. 447, 52 N.W.2d 180, 183 (1952). "The plaintiff must show some arrangement or contrivance on the part of the defendant, of an affirmative character, designed to prevent subsequent discovery." *Id.* "Mere silence is insufficient." *Sills v. Oakland Gen. Hosp.*, 220 Mich.App. 303, 559 N.W.2d 348, 352 (1996). Thus, because Techner was unable to establish that Greenberg took any affirmative act to conceal the plaintiff's cause of action from her, the district court determined that tolling of the statute of limitations for filing the plaintiff's *breach-of-contract claim* was inappropriate. We find no error in that analysis and thus affirm that portion of the district court's judgment holding that the six-year period of limitation on the filing of Techner's breach-of-contract claim, in light of the factual record before the court, could not be extended through application of equitable principles.

[5] The district court did not engage in a similar analysis regarding Techner's plea to extend the time for filing her claim alleging Helen Greenberg's *breach of fiduciary duty*. Instead, having concluded that Mich. Comp. Laws Ann. §§ 450.4404(6) and 450.4515(1)(e) constituted ***507** statutes of repose, not statutes of limitations, the district court relied upon established Michigan caselaw holding that the fraudulent-concealment statute does not operate to toll statutes of repose. *See, e.g., Baks*, 576 N.W.2d at 420; *Pukke v. Hyman Lippitt, P.C.*, No. 265477, 2006 WL 1540781, at *6 (Mich.Ct.App. June 6, 2006). Because we have concluded, however, that Mich. Comp. Laws Annot. §§ 450.4404(6) and 450.4515(1)(e) more properly are classified as true statutes of limitations, equitable principles may be applied to extend the period during which Techner's claims for breach of fiduciary duty could be filed. Moreover, unlike the requirement for the general application of Michigan's fraudulent-concealment statute, the statute's relevance in breach-of-fiduciary-duty cases is not constrained by the necessity of establishing an affirmative act by the defendant, as discussed in *Draws* and *Sills*. Indeed, the Michigan Court of Appeals has held that there is instead "*an affirmative duty to disclose* where the parties are in a fiduciary relationship." *Lumber Village, Inc. v. Siegler*, 135 Mich.App. 685, 355 N.W.2d 654, 658 (1984) (citing *Barrett v. Breault*, 275 Mich. 482, 267 N.W. 544 (1936)) (emphasis added).

It is thus clear that defendant Helen Greenberg was required to disclose to Techner that proper distributions were not being made by Barry Greenberg on behalf of Greenberg Properties, LLC, to the Ashley Greenberg Trust. This affirmative duty existed regardless of the age of or the level of involvement by the defendant. As long as Helen Greenberg remained a manager of Greenberg Properties, LLC, she was responsible for disclosing to the company's members the distributions made from the LLC's coffers. In light of *Lumber Village*'s pronouncement, because the defendant concealed the improper actions of the limited liability company's managers, the provisions of Mich. Comp. Laws Ann. § 600.5855 should have been applied in this case, allowing Ashley Techner two years from the January 18, 2010, uncovering of the defendant's malfeasance to file suit for breach of fiduciary duty. The plaintiff's recovery from the defendant thus should not have been limited to the distributions that should have been made in only the six years prior to the filing of Techner's complaint in this matter.

CONCLUSION

The district court erred in treating Mich. Comp. Laws Ann. §§ 450.4404(6) and 450.4515(1)(e) as statutes of repose, rather than as statutes of limitations. By treating those provisions as statutes of repose, the district court improperly foreclosed application of fraudulent-concealment principles to Ashley Techner's breach-of-fiduciary-duty claim. We thus AFFIRM the district court's judgment in part, REVERSE the decision in part, and REMAND the matter for recalculation of the appropriate damages amount in accordance with the directives set out in this opinion.

All Citations

553 Fed.Appx. 495

Footnotes

1 Greenberg asks us, however, to apply the rationale discussed in *Mostel v. Petrycki*, 25 Misc.3d 929, 885 N.Y.S.2d 397 (N.Y.Sup.Ct.2009), a decision of the New York County Supreme Court in which that tribunal held that the statute of limitations period applicable to New York's limited-liability-company statute overrode a contrary statute of limitations in the state's Debtor and Credit Law in a cause of action alleging that a withdrawal of funds constituted a misappropriation rather than a "wrongful distribution." Not only are we more inclined to follow the suggestion of a *Michigan* appellate court's interpretation of *Michigan* law than a New York trial court's analysis of New York and Delaware law, but we are also convinced that Techner's claims and Mostel's claims are substantively different. *Mostel* involved a disagreement over whether a single withdrawal of certain funds more properly should be considered a fraudulent conveyance (subject to a six-year statute of limitations) or an LLC distribution (subject to a three-year statute of limitations). By contrast, Techner contends here that some of Greenberg's actions and inactions contravened express terms of a contractual agreement and that other distinct actions or inactions breached fiduciary responsibilities that existed regardless of the terms of the operating agreement.

2 The plaintiff's complaint actually alleges that the improper distributions began approximately two years after the creation of Greenberg Properties, LLC, or in approximately May 2001. The district court's findings of fact, however, state that the improper, non-proportional distributions did not begin until "around February 2003." Schedule 8 of Exhibit D to Helen Greenberg's brief in support of her motion for summary judgment indicates, however, that significant disproportionate distributions to the Ashley Greenberg Trust began in January 2003 and continued through July 2009.

3 The result reached in *Virginia M. Damon Trust* also is consistent with Michigan's general accrual-of-claim statute, Mich. Comp. Laws Ann. § 600.5827. Pursuant to that provision, "[e]xcept as otherwise expressly provided, the period of limitations runs from the time the claim accrues."

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